Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GARY W. JENKINS,
Petitioner,

V.

AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL PRODUCTS CO.;
RHONE POULENC AG. COMPANY;
PLATTE CHEMICAL CO.;
and
FARMLAND INDUSTRIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER CONGRESS INTENDED THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA) TO PREEMPT STATE TORT DAMAGES ACTIONS?

II. WHETHER (A) THE RIGHT TO A "REMEDY BY DUE COURSE OF LAW" IS A LIBERTY INTEREST PROTECTED BY THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND IF SO, (B) CONGRESS MUST PROVIDE A REASONABLE ALTERNATIVE REMEDY WHEN ITS LEGISLATION SIGNIFICANTLY INTERFERES WITH SUCH AN INTEREST?

LIST OF PARTIES

Petitioner, Gary W. Jenkins, appeared as plaintiff/appellant below. Respondents: Amchem Products, Inc.; Union Carbide Agricultural Products Co.; Rhone Poulenc Ag Company; Platte Chemical Co.; and Farmland Industries, Inc., appeared as defendants/ appellees/cross appellants below.

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Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

—+—

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion, and the denial of rehearing of the Kansas Supreme Court, entered on March 22, 1995.

OPINION BELOW

The opinion of the Supreme Court of Kansas is reported at 256 Kan. 602, 886 P.2d 869 (1994) and is reproduced in Petitioner's appendix, infra, beginning at page B1. Petitioner's appeal from the Sedgwick, County, Kansas District Court was transferred to the Kansas Supreme Court pursuant to Kan. Stat. Ann. §20-3017. (886 P.2d at 873) app. p.B7. Therefore, the Kansas Court of Appeals did not issue an opinion.

JURISDICTION

The Kansas Supreme Court filed the opinion below on December 16, 1994. *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), app. p. B1. On January 6, 1995 Petitioner filed a timely Motion for Rehearing with the Kansas Supreme Court. The Kansas Supreme Court denied the motion for Rehearing on March 22, 1995. *Jenkins v. Amchem Products, Inc.*, No. 94-71406-AS, slip op. at 1 (Kan. March 22, 1995), app. p. A1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Because the constitutionality of 7 U.S.C. § 136v(b) may be at issue, 28 U.S.C. § 2403(a) may be applicable, and Petitioner will so inform the Solicitor General of the United States, as directed by U.S. Supreme Court Rule #29.4(b).

CONSTITUTIONAL PROVISIONS INVOLVED

The **Fifth Amendment** provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

> Militias, when in actual servic in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any crimninal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The **Ninth Amendment** provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The **Tenth Amendment** provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES INVOLVED

The pertinent provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, are included in the appendix, page D1.

STATEMENT OF THE CASE

Gary Jenkins, a farmer and rancher in Kansas, used the chemical commonly known as 2,4-D from the mid 1960's until 1990, when he was diagnosed with non-Hodgkin's lymphoma. He filed suit in state court alleging that his long term use of 2,4-D caused his disease. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869, 872 (Kan. 1994), app. p. B4, *reh'g denied*, No. 94-71406-AS, slip op. at 1 (Kan. March 22, 1995). app. p. A1. His

theories for recovery were (1) negligent failure to warn, (2) strict liability based upon a failure to warn and (3) strict liability pursuant to the "unreasonably dangerous" product test of the Restatement, 2d, Torts, § 402A. *Id.* at 872-873, app. p.B5. The respondents, Amchem Products, Inc.; Union Carbide Agricultural Products Co.; Rhone Poulenc Ag Comany; Platte Chemical Co.; and Farmland Industries, Inc., deny, generally, that 2,4-D causes cancer. Respondents admit that the labels on their pesticide contain no information or warning regarding 2,4-D's carcinogenic potential. *Id.* at 881, app. p, B23.

The trial court dismissed Petitioner's claims based upon the inadequacy of warnings as preempted by FIFRA. *Id.* at 872-73, app. p.B5. The trial court ruled that if petitioner proved that 2,4-D causes cancer, he would not have to prove a more specific "design defect." *Id.* at 873, app. p.B5. The Respondents cross appealed the trial court's ruling on that issue. *Id.* However, the trial court found that the "pure" consumer expectation test for "design defect" claims necessarily implicated the adequacy of the labeling, and that therefore, that claim by Petitioner was also preempted. *Id.*, app. p. B7.

The Kansas Supreme Court ruled that Petitioner's strict liability and negligent "failure to warn" claims were preempted by FIFRA, 7 U.S.C. § 136v(b). *Id.* at 879, app. p. B19. The Kansas Supreme Court reversed the trial court's finding that, under Kansas law, if petitioner proved 2,4-D's inherent capacity to cause cancer, he need not prove a more specific "defect." *Id.* at 888, app. p. B37. The Kansas Supreme Court ruled that claims based upon a failure to warn through advertisements, shelf displays or counter tops, for instance, are also preempted. *Id.* at 881-882, app. B24. Petitioner acknowledges that the substantive requirements of a Kansas product liability claim does not raise a significant federal question, and the intricacies of substantive Kansas tort law are not the subject of this petition for a writ of certiorari.

Petitioner argued that Congress did not intend to forbid states from awarding damages upon a common law failure to warn theory. *See id.* at 874, app. p. B10. In an *amicus* brief on behalf of the Petitioner, the Trial Lawyers for Public Justice, and Public Citizen argued that, because a state law damages action for failure to warn does not impose a labeling and packaging requirement beyond that required by FIFRA, FIFRA does not preempt such a claim. *Id.* at 880, app. p. B21. The court rejected that argument. *Id.* at 881, app. p. B22.

Petitioner argued that if Congress intended FIFRA to preempt such claims, FIFRA is an unconstitutional interference with the Petitioner's fundamental liberty interest right under the Fifth Amendment to a remedy by due course of law for unjustified intrusions on personal security. *Id.* at 884, app. p. B29-30. The Kansas Supreme Court held that Petitioner's common law claims were protected by the Kansas Constitution, but not the U.S. Constitution, because these rights "arise" out of the Kansas Constitution. *Id.* at 885, app. p. B30. The Kansas Supreme Court relied on *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L. Ed. 2d 595 (1978), in holding that there is no requirement under the United States Constitution that a reasonable alternative remedy be established upon modification of a significant common law right. *Id.* at 886, app. p. B32. The Kansas Supreme Court acknowledged that Petitioner raised his constitutional claims in the trial court. *Id.* at 884, app. p. B28.

After issuance of the opinion by the Kansas Supreme Court, on December 16, 1994, Petitioner filed a timely motion for rehearing. The request for rehearing was denied. *Jenkins v. Amchem Products, Inc.*, No. 94-71406-AS, slip op. at 1 (Kan. March 22, 1995), app. p. A1.

REASONS FOR GRANTING THE WRIT

I. Congress did not Intend FIFRA to preempt state failure to warn and implied warranty tort claims.

A. Current FIFRA preemption cases result in the abrogation of a general area of normative tort law.

By ruling that FIFRA preempts certain state tort claims, the Kansas Supreme Court and other courts[1] have abrogated the common law of warning and implied warranty as applied to the nearly 50,000 products[2] regulated by FIFRA. Neither the language of FIFRA nor the legislative history of this 1972 Act[3] requires such a construction. When it passed FIFRA, Congress was aware of its duty to maintain the proper balance of federalism. *See United States v. Lopez*, No. 93-1260, 1995 WL 238424, at *16 (U.S. April 18, 1995) (Kennedy, J. concurring). Congress knew in 1972 of the states' interest in compensating victims of defective products. In an area where the Constitution requires a delicate balancing of state and federal interests, Petitioner respectfully submits the leading FIFRA preemption cases[4] have not shown the expected degree of solicitude regarding the traditional prerogative of the States to administer their substantive tort law. *See U.S. Term Limits, Inc., v. Thorton*, 93-1456, 63 LW 4413, 4431 (U.S. May 22, 1995) (Kennedy, J., concurring). The Kansas Supreme Court recognized

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[1] *See, e.g., Papas v. Upjohn*, 985 F.2d 516 (11th Cir.), *cert. denied, Papas v. Zoecon Corp.*, ___ U.S. ___, 114 S. Ct. 300, 126 L. Ed. 2d 248 (1993); *Arkansas-Platte & Gulf v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993).

[2] *See Riden v. ICA Americas, Inc.*, 763 F. Supp. 1500, 1508 (W.D. Mo. 1991).

[3] *See* Pub. L. No. 92-516, Stat. 973-998 (1972).

[4] *See* cases cited in note 1, supra.

the merits of some of Petitioner's arguments, but because five federal circuit courts had rejected similar arguments, it stated that "we are not writing on a clean slate." *Jenkins*, 886 P.2d at 880, app. p. B20.

This Court's decisions evidence a concern for traditional state common law designed to provide compensation for personal injury, a "critical component of the states' traditional ability to protect the health and safety of their citizens." *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 2631, 120 L. Ed. 2d 407 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). This concern has been articulated particularly where preemption would leave persons with no remedy for common law torts.[5]

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984), *reh'g denied*, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754, this Court held that the Atomic Energy Act does not preempt state common law awards for punitive damages. The majority held that although Congress intended to "occupy the field" of nuclear safety regulation pursuant to the Atomic Energy Act, the Court saw no evidence of congressional intent to interfere with state common law claims, and stated:

> This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. *id.* at 251

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[5] *See Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169, *reh'g denied*, 471 U.S. 1062, 105 S.Ct. 2173, 85 L. Ed. 2d 491 (1985); *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987); *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443, *reh'g denied*, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984).

A dissenting opinion in *Silkwood* concluded that the Act preempted awards for punitive damages because such awards are designed, not to compensate tort victims, but to regulate future business decisions, and that area of regulation was governed by the federal statute. *Id.* at 260-61 (Blackmun, J., dissenting) (citations omitted). The dissent argued, however, that the Act did not preempt state awards for compensatory damages:

> Because the [Act] does not regulate the compensation of victims, and because it is inconceivable that congress intended to leave victims with no remedy at all, the pre-emption analysis established by *Pacific Gas* comfortably accommodates--indeed it compels--the conclusion that compensatory damages are not preempted whereas punitive damages are.

Id. at 263-64 (Blackmun, J., dissenting) (citation omitted).

In *Cipollone*, the plaintiff contended that the cigarette acts only prohibited direct state regulation by statute or administrative rule, but did not prohibit state common law damages claims. 112 S. Ct. at 2620-2621 (plurality opinion). A plurality of this Court found otherwise as to some of the plaintiff's claims. *Id.* at 2621-23. *Cipollone*, however, involved a statute containing no savings clause. FIFRA, by contrast, includes a broad grant of authority to the states concerning regulation of products covered by FIFRA. 7 U.S.C. 136v(a). This Court construed the statute at issue in *Cipollone* as a restraint on some areas of the common law of the states. *Cipollone*, 112 S. Ct. at 2621. FIFRA's broad grant of authority to the states, by contrast, is evidence of Congress' intent to preserve the states' authority to award damages to those injured by defective products.

This Court should grant the petition for writ of certiorari to determine whether *Cipollone*'s express preemption analysis is

applicable in the context of a federal regulatory statute containing such a broad grant of authority to the states as that which is contained in § 7 U.S.C. 136v(a). By so ruling, and by applying the approach of Justice Blackmun in the *Silkwood* dissent, this Court can avoid the important constitutional questions posed in section II of this petition.

B. Compliance with both FIFRA and state common law duties underlying failure to warn damages claims is not impossible.

Respondents have admitted that their labels contain no information regarding 2,4-D's ability to cause cancer. *Jenkins*, 886 P.2d at 881, app. p. B23. There simply is no federal regulation stating that a 2,4-D label will state thereon "warning: this product may cause cancer", or words to similar effect. If Petitioner were alleging that Respondent breached its duty to warn Petitioner despite affixing a federally **dictated** warning designed to inform of the type of risk Petitioner complains of, an argument for preemption might be made. *Cf. Cipollone*, 112 S. Ct at 2614 n. 4 (noting the extreme difficulty that a plaintiff would have in proving that the federally mandated specific warning label was inadequate). However, that is not the situation here. Respondents admit their warnings were completely silent regarding the risk at issue. Thus, "it is not impossible for [the Respondents] to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *See Freightliner Corp. v. Myrick*, No. 94-286, 1995 WL 224617, at *6 (U.S. April 18, 1995).

FIFRA preempts only state labeling requirements that are "in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). Thus, FIFRA's preemptive scope is limited by what FIFRA itself requires. FIFRA requires that labels contain adequate warnings to protect against unreasonable adverse effects on health and the environment. 7 U.S.C. § 136(q)(1)(F)-(G). A product with a label that lacks such adequate warning is

misbranded in violation of FIFRA, even if the EPA approved the inadequate label. Thus, the registrant has an ongoing obligation under FIFRA to ensure that its pesticide labels provide adequate warnings to protect health and the environment. *See* 7 U.S.C. § 136a(f)(1); *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 947 (9th Cir. 1992).

If nothing else, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari, vacate, and remand this case to the Kansas Supreme Court pursuant to this Court's recent holding that "the absence of a federal standard cannot implicitly extinguish state common law." *Myrick*, 1995 WL 224617 at *6. This Court decided *Myrick* on April 18, 1995. *Id.* at *1. The Kansas Supreme Court denied Petitioner's request for Rehearing on March 22, 1995. *Jenkins v. Amchem Products, Inc.*, No. 94-71406-AS, slip op. at 1 (Kan. March 22, 1995), app. p. A1. Alternatively, given the federal government's interest in the interpretation of FIFRA, the Court could ask for the views of the Solicitor General regarding the preemptive scope of FIFRA.

C. A proper resolution of these issues necessarily raises questions concerning our system of federalism.

As one commentator has observed, "[p]re-emption doctrine should not do the work of the dormant Commerce Clause in the name of 'uniformity.'" Paul Wolfson, Preemption And Federalism: The Missing Link, 16 Hastings Const. L. Q. 69, 106 (1988). State tort actions do not place an undue burden on interstate commerce. While state tort actions may be a "burden" on commerce, it is a burden contemplated, indeed compelled, by our system of federalism, for it is the states that are charged with the primary duty of administration of private law through a civil justice system. *See United States v. Lopez*, No. 93-1260, 1995 WL 238424 at *18 (U.S. April 18, 1995) (Kennedy, J. concurring). The power to define their substantive tort law "existed" in the states, not the federal government, at the time of adopting the Constitution; that

power was "reserved" to the states by the Tenth Amendment. *See U.S. Term Limits, Inc., v. Thorton*, #93-1456, 63 LW 4413, 4420 (U.S. May 22, 1995). Fundamental principles of federalism require recognizing and protecting traditional state tort law from unwarranted federal intrusion.

Current FIFRA preemption analysis fails to recognize that if Congress intended to preempt such core, common law rights, then "the exercise of national power seeks to intrude upon an area of traditional state concern." *See United States v. Lopez*, No. 93-1260, 1995 WL 238424 at *18 (U.S. April 18, 1995) (Kennedy, J. concurring). Judge Jack Weinstein, in a FIFRA preemption case, observed:

> In approaching the issue, we must bear in mind that protection of the public against toxic substances has traditionally been a matter left to the states. The states have developed a complex, interlocking set of statutory and common law substantive, procedural and remedial tort rules. These rules have evolved to provide compensation for injuries and to help deter injurious behavior in a complex industrial environment where technology has outrun the ability of the average person to understand the dangers which he or she confronts and how to protect against them.
>
> By contrast, the federal government has never adopted comprehensive legislation for compensating those injured by hazardous products. It is a relative newcomer to this area and its tentative forays into the field have mainly been designed to ensure that products can pass freely from one state to another without the need for repackaging[.] ...Consumers and others must still look to the great font of state tort law for protection against harmful toxic substances. Too ready a tendency to declare a state protective shield

> replaced by the still somewhat spotty federal protections will leave many injured persons without recourse.

Burke v. Dow Chemical Co., 797 F. Supp. 1128, 1131-1132 (E.D.N.Y 1992) (citation omitted).

Current FIFRA case law interpretations also interfere with the proper accountability that our system of federalism demands. To whom does a citizen such as Gary Jenkins complain for his lack of a remedy for a traditional, common law injury: the federal government, or the state of Kansas for its failure to "bend" its substantive tort rules in order to circumvent federal preemption of its traditional, substantive tort law? *See Lopez*, 1995 WL 238424 at *16 (Kennedy, J., concurring); *New York v. United States*, 505 U.S. ___, 112 S. Ct. 2408, 2423-25, 120 L. Ed.2d 120, (1992). While the federal government has stepped in to regulate the precise words on a pesticde label, to the exclusion of the state, it has not offered a body of law to provide a remedy when its regulatory scheme fails. This is hardly surprising, because:

> There is no federal general common law. Congress has no power to decalare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tomkins, 304 U.S 64, 78, 58 S. Ct. 817, 82 L. Ed.1188 (1938).

This Court should grant the petition for a writ of certiorari to examine these important questions of federalism. A careful reading of the Constitution provides no authority for either Congress through legislation, or the federal courts through preemption doctrine, to federalize tort law.

II. The right to a "remedy by due course of law" is a liberty interest protected by the Fifth Amendment's Due Process Clause, and Congress must provide a reasonable substitute remedy when its legislation significantly interferes with such protected interests

A. This court expressly has reserved the question whether the Constitution requires Congress to provide alternative remedies when it preempts traditional state tort law

If FIFRA preempts state law failure to warn and implied warranty claims, this case squarely presents an issue previously identified by this Court:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights,...at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93-94, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (Marshall, J., concurring) (citations omitted).

In this case, the Kansas Supreme Court declared that the "United States Supreme Court has not recognized a quid pro quo requirement to the Due Process Clause." *Jenkins*, 886 P.2d at 885, app. p. B31. The court relied on a footnote in one of this Court's decisions as the authority for its assertion. *Jenkins*, 886 P.2d at 885-86, app. p. B31 (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32, 95 S.Ct. 2620, 57 L.Ed.2d 595 (1978)). The court then held:

> Although FIFRA does not provide an alternate cause of action for the failure to warn actions

> preempted by §136v(b), there is no requirement under the United States Constitution that an alternate cause of action be established.

Jenkins, 886 P.2d at 886, app. pB32.

The Kansas Supreme Court has rendered a decision of considerable constitutional significance, and answers a question which this Court has not yet resolved. Although this Court has never held that a quid pro quo is required when Congress abolishes or substantially modifies a common law cause of action, the converse is also true: *Duke Power* left open the question whether a quid pro quo is required. In that case, this Court observed:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

Duke Power, 438 U.S. at 88.

Petitioner acknowledges that "statutes limiting liability... have consistently been enforced by the courts." *Id.* at 88 n. 32 (citations omitted). Petitioner maintains, however, that this is not a predicate for the proposition that Congress can abolish a fundamental common law right without providing any alternative remedy.

Certiorari should be granted to review this important question of federal law, a question previously left unanswered by this court. Justice White recognized the importance of this question when he dissented from the dismissal of an appeal for lack of a significant federal question; he would have had briefing and arguments on the merits to address the question raised but left unanswered in footnote 32 of the *Duke Power* case. *See Fein v.*

Permanente, 474 U.S. 892, 893-94, 106 S. Ct. 214, 88 L.Ed.2d 215 (1985) (White, J., dissenting). This question has significant ramifications for plaintiffs injured by tortious activity that is regulated in part by federal law. The issue is squarely and clearly presented in this case, providing the Court with an excellent opportunity to address and resolve it.

B. Petitioner has a protected liberty interest in bodily integrity/self-determination.

Petitioner has alleged that his cancer was caused by twenty years of exposure to Respondents' chemicals, and that Respondents possessed sufficient information that they should have warned Petitioner that repeated use of these chemicals might cause serious bodily injury. Petitioner submits that, for the purposes of this constitutional challenge, these allegations must be accepted as true. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). In essence, Petitioner's right to self-determination, his right to choose between confronting or rejecting the risk of the product, was wrongfully denied to him.

Cases analyzing the "informed consent" doctrine are particularly instructive of Mr. Jenkin's constitutional right to be able to confront or avoid the risks to bodily integrity. In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279, 110 S.Ct. 2841, L. Ed. 2d (1990), this Court assumed that a competent person's right to refuse life-saving medical care was a liberty interest. *Cruzan*, 110 S.Ct at 2852. Justice Brennan, in dissent, stated:

> The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges. This right has long been 'firmly entrenched in American tort law' and is securely grounded in the earliest common law. 'Anglo-American law starts with the

> premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment.' The inviolability of the person has been held as 'sacred' and 'carefully guarded' as any common law right. Thus, freedom from unwanted medical attention is unquestionably among those principles 'so rooted in the tradition and conscience of our people as to be ranked as fundamental.'

Cruzan, 497 U.S. at 305 (Brennan, J., dissenting) (citations omitted) (emphasis in original).

If Gary Jenkins has a fundamental right "to determine what shall be done with one's own body" in the context of medical treatment, that right also should extend to his right to be free from repeated, unwanted exposures to a toxic, cancer causing chemical.

C. Petitioner's liberty interest can only be protected if he has a legal remedy.

1. Due process requires a remedy for deprivations of protected liberty interests

The right to personal security is meaningless without a remedy for its violation. This Court has recognized that the right to judicial relief for violations of "personal security" is a fundamental liberty interest under the Fifth Amendment. The Court has concluded:

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown....Among the historic liberties so

protected was a right to be free from *and to obtain judicial relief,* for unjustified intrusions on personal security.

Ingraham v. Wright, 430 U.S. 651, 672-73, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (citations omitted). (emphasis added).[6]

At common law, the King, as the "fountain of justice," was duty bound to provide a remedy in the form of laws, for "such wrongs as may be committed in the mutual intercourse between subject and subject[.]" 3 W. Blackstone, Commentaries *115. This comment indicates the historical roots of the "remedy by due course of law," or "access to courts" clauses, found in thirty-seven state constitutions. *See* F. McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 AM. U. L. Rev. 579, 615 (1981). The right to a remedy for tortious injuries is so much a part of traditional English and American legal principles that a number of the original states included some form of a "right to a remedy" provision in their early state constitutions. *See, e.g.*, Pa. Const. of 1790, art. I, § 11; *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 73 (Del. 1962) (stating that, Article I, Section 9 of the current Delaware Constitution, which contains a "remedy by due course of law" provision, "was made a fundamental part of the law of the State" by the Delaware Constitution of 1792); Conn. Const. of 1818 art. First, § 12. The inclusion of such provisions in state constitutions, along with Blackstone's comment on this subject, demonstrates a tradition relevant for determining the scope of the liberty guaranteed by the Fifth Amendment. These state constitutional provisions reliably indicate that the right to a remedy by due course of law for a wrongful act affecting personal security

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[6] *Ingraham* involved a procedural due process challenge to a school district's "paddling" policy. The Court specifically found that Fourteenth Amendment liberty interests are implicated when there is an infliction of appreciable physical pain. *Ingraham*, 430 U.S. at 674. (citations omitted). This Court held that the school's policy satisfied procedural due process because the state preserved the child's ***substantive***, common law remedy to sue for damages. *Id.* at 675-76 (emphasis added) (citations omitted).

is part of the liberty guaranteed by the Fifth Amendment's Due Process Clause. The Kansas Constitution includes such a clause. Kan. Const. Bill of Rights, § 18.

Congressional interference with Kansas' duty and right to apply this protection violates Petitioner's liberty interest. Thus, Petitioner "assert[s] denial of [a] right vouchsafed to him by the state[.]" *See Paul v. Davis*, 424 U.S. 693, 712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Petitioner has a protected liberty interest under either a "fundamental" rights analysis, *see Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992) (plurality opinion), or a "text or tradition" analysis. *Id.* 112 S. Ct at 2874 (Scalia, J., dissenting). Petitioner does not claim that his rights were violated because the federal government failed to prevent his injury. *Deshaney v. Winnebago County Dept. of Social Services* 489 U.S. 189, 191, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). He claims, rather, that FIFRA prevents him from obtaining a "remedy by due course of law."

FIFRA interferes with a fundamental liberty interest. It is unconstitutional because it is not "narrowly tailored to serve a compelling state interest." *See Reno v. Flores*, ___ U.S. ___, 113 S.Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993). The only arguable federal interest in preemption under FIFRA is to promote "uniformity" in labeling. *See Jenkins v. Amchem Products, Inc.*, 886 P.2d at 886, app. p. B32. This Court has described the federal interest in uniformity as the "most generic (and lightly invoked)" of federal interests; the federal interest in uniformity typically does not justify supplanting state law. *O'Melveny & Myers v. F.D.I.C.*, ___U.S. ___, 114 S.Ct. 2048, 2055, 129 L. Ed. 2d 67 (1994). The federal interest in uniformity is not compelling and does not justify interfering with petitioner's Fifth Amendment right to a "remedy by due course of law."

The question presented is corollary to the issue addressed in *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). There, a concurrence assumed, for the purpose of argument, that some interests that were historically protected by the common law of torts are protected by the due process clause. *Id.* at 818 (Kennedy J., concurring). The concurring Justices, however, reserved the question whether there was a cognizable constitutional tort in that case because state law provided a tort remedy for malicious prosecution and no federal law preempted such a remedy. *Id.* at 819. Congress' authority to regulate interstate commerce is limited by constitutional provisions protecting individual liberties. *See Fry v. United States*, 421 U.S. 542, 553, 95 S.Ct 1792, 44 L. Ed. 2d 363 (1975) (Rehnquist, J., dissenting).

2. The Assertion that other valid state law claims theoretically remain to Petitioner is a fiction.

The Kansas Supreme Court opined, in dicta, that:

> ...FIFRA does not preempt all state damage claims; rather, FIFRA preempts only those state damage claims that impose different or additional labeling requirements. Claims based on design defects, manufacturing defects, and failure to test, for example, are not preempted.

Jenkins, 886 P.2d at 884, app. p. B28.

The assertion that Petitioner still could proceed upon a design defect or manufacturing defect theory is a fiction. By definition,[7] a chemical such as 2,4-D has a particular molecular identity. If an expert opined that Respondents should have changed the "design" of 2,4-D, he would be stating that Respondents should have created a different chemical -- a different product. The law of design defect does not contemplate such a result.[8]

Here, Jenkins cannot prove a manufacturing defect, because he no longer has possession of the 2,4-D he used for over 20 years to determine whether it deviated from the expected norm of the production line.[9] A latent disease plaintiff will, in all probability, never be able to show a manufacturing defect claim.

Whether a "failure to test" is an independent basis for imposing liability, or a means of proving negligence, need not be decided here. In this case, Petitioner asserted that Respondents did

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[7] The Toxic Substance and Control Act, 15 U.S.C. §2601 et seq., defines "chemical substance" as:

> "Any organic or inorganic substance of a *particular molecular identity*, including any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature..."

40 CFR §710.2(h). (emphasis added).

[8] *See, e.g.*, Beasley, J., Products Liability and the Unreasonably Dangerous Requirement, 212 (ALI-ABA 1981); *Soule v. General Motors Co.*, 882 P.2d 298, 305 (Cal 1994).

[9] Beasley, J., Products Liability and the Unreasonably Dangerous Requirement at 69-70.

test and that those tests showed contamination[10] with toxic substances. Respondents failed to inform or warn Petitioner of the results of those tests. Obviously, Petitioner has no failure to test claim, because the testing which was performed supports a failure to warn claim -- the very claim preempted.

The assertion that other valid claims remain to Petitioner, and the many others similarly situated, whether with regard to this chemical or others, is simply not true. "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee*, 243 U.S. 90, 91, 37 S. Ct. 343, 61 L. Ed. (1917) (Holmes, J.).

Thus, it should be clear that FIFRA preemption, as applied by the Kansas Supreme Court, results in a general legislative repeal of the normative law of negligent failure to warn, strict liability warning law and implied warranty with respect to thousands of potentially harmful products.[11]

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[10] Petitioner's expert signed an affidavit stating:

> 3. I have reviewed the medical literature, as well as some internal documents of defendants herein, particularly a document of Mr. Jean Noel Tabet, dated October 8, 1993. Based upon this review...it is my opinion that ...the 2,4-D Mr Jenkins was exposed to was contaminated with toxic substances, including various isomers of dioxin, dibenzofurans and nitrosamines.

App. p. C13.

[11] The distinction between the theory of implied warranty and strict liability under Restatement, Second of Torts, §402a, is negligible. See, Clark, The Law of Product Warranties, §5.01[2][a][ii], 12.03[1] (Warren, Gorham & Lamont 1984).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition and issue a writ of certiorari to the Kansas Supreme Court.

Respectfully submitted,
Mark A. Furney
(Counsel of Record)
6701 West 64th Street
Suite 230
Overland Park, Kansas 66202
(913) 677-1166
Counsel for Petitioner,
Gary Jenkins

APPENDIX

SUPREME COURT ORDER
DISTRICT CASE NO. 92C3037

IN THE SUPREME COURT
OF THE STATE OF KANSAS

MARK A. FURNEY
6701 W. 64TH ST., SUITE 230
OVERLAND PARK, KS 66202

GARY W. JENKINS, APPELLANT,

V NO. 94-71406-AS

AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY;
RHONE POULENC AG COMPANY;
PLATTE CHEMICAL COMPANY;
AND
FARMLAND INDUSTRIES, INC., APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANT, GARY JENKINS.
DENIED.
RESPONSE NOTED.

DATE: 03/22/95.

CAROL G. GREEN
CLERK

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 71,406

GARY W. JENKINS,
Appellant/Cross-appellee,

v.

AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY;
RHONE POULENC AG COMPANY;
PLATTE CHEMICAL COMPANY; and
FARMLAND INDUSTRIES, INC.,
Appellees/Cross-appellants.

SYLLABUS BY THE COURT

BI

1.

Congress' intent to preempt state law may be explicitly stated in a statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

2.

Federal, rather than state, law governs whether and to what extent the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1988), preempts a state cause of action arising out of a failure to warn.

3.

To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's labeling or packaging failed to meet a standard in addition to or different from Federal Insecticide, Fungicide, or Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1988), requirements, § 136v preempts the claims.

4.

A common-law tort claim which challenges the labeling or packaging of products governed by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1988), constitutes a "requirement for labeling or packaging" barred by § 136v(b) notwithstanding the general grant of power in §136v(a).

5.

Any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn a plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. A plaintiff may not interfere with the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1988), scheme by bringing a common-law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, these claims are also preempted by the Act. If a pesticide manufacturer places EPA-

approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends.

6.

One test for determining whether a claim is preempted is whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label. If in seeking to avoid liability the manufacturer would alter the label of its product, a state law damages action imposing liability would impose a requirement for labeling beyond Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. ss. 136 *et seq.* (1988) requirements. Such an action is preempted by § 136v(b). However, if in seeking to avoid liability the manufacturer would alter the product itself, rather than the product's label, a state law damages action imposing liability would impose no requirement for labeling beyond the Act requirements and § 136v(b) would not preempt such an action.

7.

The United States Supreme Court has not recognized a quid pro quo requirement to the Due Process Clause. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common-law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

8.

A plaintiff, to present a prima facie strict liability case, must produce proof of three elements: (1) The injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed at the time it left the defendant's control. The defect may be in the product's preparation, in the product's container or packaging, or in the instructions or warnings necessary for the product's safe use. These are commonly referred to as "design defects," "manufacturing defects," and "warning defects."

9.

In a products liability action, the fact that a defendant manufacturer does not claim its products were unavoidably unsafe does not relieve a plaintiff from the burden of proving that defendant's products were defective.

Appeal from Sedgwick district court, KARL W. FRIEDEL, judge. Opinion filed December 16, 1994. Affirmed.

Mark A. Furney, of Overland Park, argued the cause and *Brenden W. Webb*, of Overland Park, was with him on the briefs for appellant/cross-appellee.

Stephen W. Jacobson, of Kansas City, Missouri, argued the cause, and *Monte Vines* and *Donald W. Bostwick*, of Adams, Jones, Robinson & Malone, of Wichita, were with him on the briefs for appellees/cross appellants.

Patti A. Goldman, of Sierra Club Legal Defense Fund, of Seattle, Washington; *Brian Wolfman*, of Public Citizen Litigation Group, of Washington, D.C.; *Arthur H. Bryant* and *Adele P. Kimmel*, of Trial Lawyers for Public Justice, of Washington, D.C.; and *Gene E. Schroer*, of Schroer, Rice, P.A., of Topeka, were on the *amici curiae* brief for Trial Lawyers for Public Justice and Public Citizen.

The opinion of the court was delivered by

ABBOTT, J.: Plaintiff Gary Jenkins instituted this products liability action against defendants Amchem Products, In., Union Carbide Agricultural Product Company, Rhone Poulenc Ag Company, Platte Chemical Company, and Farmland Industries, Inc., alleging that his long-term use of the herbicide chemical commonly known as 2,4-D caused or contributed to his development of non-Hodgkin's lymphoma. The trial court ruled that if plaintiff proved defendants' products cause cancer, plaintiff would have established a prima facie strict liability claim without having to prove a more specific defect. However, the trial court granted summary judgment to defendants and determined that plaintiff's failure to warn and strict liability claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. ss. 136 *et seq.* (1988). Plaintiff appeals and defendants cross-appeal.

Gary Jenkins has farmed and ranched for many years. During this time, he was exposed to chlorophenoxy herbicides, which have as an active ingredient the chemical commonly known as 2,4-D, manufactured or produced by the defendants. Chlorophenoxy herbicides are used to kill broad leaf weeds in fields and brush in pastures. In December 1990, plaintiff was diagnosed with non-Hodgkin's lymphoma.

Plaintiff instituted this action in the trial court, alleging that the defendants' products were defective and unreasonably dangerous and that the products either caused or were substantial factors in causing plaintiff's disease. Plaintiff's expert witness stated that the defendants' 2,4-D herbicide products were contaminated with toxic substances, including dioxin. Plaintiff's expert opined it was more probable than not that plaintiff's long-term exposure to 2,4-D significantly contributed to the causation of his disease, but the expert could not state "that the failure to manufacture 2,4-D, free of toxic contaminants . . . is what caused Gary Jenkins' non-Hodgkin's lymphoma." The pretrial order set forth the following theories of liability: (1) negligence; (2) failure to adequately test the product to make sure it was safe and/or free from harmful contaminants; (3) failure to warn or properly communicate to plaintiff that long-term exposure to the products greatly increased his risk of developing non-Hodgkin's lymphoma; and (4) strict liability in PIK Civ. 2d 13.21 (1993 Supp.), because chlorophenoxy herbicides were defective and unreasonably dangerous in that the products were dangerous to an extent beyond that which would be contemplated by the ordinary consumer and were defective because they were incapable of being produced free from harmful contaminants.

The defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, arguing that plaintiff's claims based on inadequate warnings were preempted by FIFRA. FIFRA covers pesticides, insecticides, slimicides, herbicides (2,4-D is a herbicide), and other chemicals. The court granted the motion to dismiss "as to [plaintiff's] failure to warn theory based upon labeling & packaging *only* due to preemption" by FIFRA.

The defendants also sought summary judgment, making the same argument as to plaintiff's entire cause of action for failure to warn. The trial court granted partial summary judgment, holding that the preemption extended to plaintiff's claims based on failure to warn by advertisements or other generalized means; by press releases or advisory circulars; by appropriate store displays, shelf placards, or counter signs; by limiting sale of the product so the sale does not exceed the scope of potential buyers who would not be adequately warned by labels on the product; and by disseminating any other type of warning which did not per se require that it be affixed as a label or to the package itself. The trial court concluded:

> "[R]eferring to Plaintiff's four legal theories as stated in the pretrial order, this ruling restricts theory 1 [negligence], leaves theory 2 [failure to adequately test] untouched, eliminates theory 3 [failure to warn], and restricts theory 4 [strict liability] to the extent it is based upon a failure to adequately warn or instruct. The court accepts plaintiff's explanation that his theory 4 includes strict liability based upon failure to warn/instruct, even though that basis may not appear from the express language in the pretrial order, and therefore finds it unnecessary to amend the pretrial order to make that clear."

Plaintiff then filed a "motion for pretrial determination of question of law, and motion to reconsider court's ruling granting summary judgment on failure to warn claim." The plaintiff set forth this question:

> "Whether plaintiff's contention that 2,4-D causes non-Hodgkin's Lymphoma is a sufficient 'defect' to state a claim under Restatement, Second, Torts, sec. 402A, when the defendants are not contending that their product is an 'unavoidably unsafe' product pursuant to the 'comment k' exception to § 402A, Restatement, Second of Torts."

Plaintiff also stipulated that his claims for manufacturing or design defect based on negligence and failure to adequately test the product should be dismissed as independent bases of liability.

The trial court answered plaintiff's pretrial question of law in the affirmative, holding:

> "[I]f Plaintiff proves as he alleges, that Defendants' chemical product causes cancer (non-Hodgkin's lymphoma), he will not be required to prove a more specific 'defect'. It would then be a question of fact for the jury to determine whether the Defendants' chemical product was in a 'defective condition unreasonably dangerous', using the definition of 'unreasonably dangerous' set forth in the fourth paragraph of PIK Civ. 2d (Supp.) 13.21 (the 'consumer expectation test')."

The trial court next ruled, upon defendants' motion for pretrial determination of a question of law, that plaintiff's claims based on the "consumer expectation test" were inextricably related to the issue of the adequacy of the defendants' labeling and packaging information. The court therefore held that its grant of partial summary judgment precluded plaintiff's strict liability claim as well. Because of this ruling, the court determined that all of plaintiff's claims had been adjudicated or otherwise disposed of, and the case was dismissed.

Plaintiff appealed and defendants cross-appealed. The appeals were transferred to this court pursuant to K.S.A. 20-3017. This court permitted Public Citizen and Trial Lawyers for Public Justice to file an *amici curiae* brief. Plaintiff claims against defendants other than those named herein were disposed of. Prior to this action, Amchem Products, Inc., merged into Union Carbide Agricultural Products, Inc., which in turn merged into Rhone Poulenc Ag Company. The remaining defendants are Rhone Poulenc Ag Company, Platte Chemical Company, and Farmland Industries, Inc.

I. FIFRA

The trial court held that FIFRA preempts state law claims based upon inadequate labeling and failure to warn. The court also held that plaintiff's strict liability claims were inextricably related to the adequacy of defendants' labeling and packaging information and, therefore, claims based on the "consumer expectation test" were also preempted. Plaintiff argues that FIFRA does not preempt any state damages actions and that strict liability claims

based on inherent defects are also not preempted. The question before this court is whether FIFRA does preempt state damages actions and, if so, which such actions are preempted.

The doctrine of federal preemption is founded on the Supremacy Clause, U.S. Const. art. VI, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."

Thus, any "state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 120 L. Ed. 2d 407, 422, 122 S. Ct. 2608 (1992). The preemption analysis presumes that police powers historically left to the states are not superseded by federal law. *Cipollone*, 120 L. Ed. 2d at 422; *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1023 (5th Cir. 1994). The presumption against federal preemption of state law may be overcome if Congress intended preemption. See *Cipollone*, 120 L. Ed. 2d at 422; *MacDonald*, 27 F.3d at 1023. Preemption may be express of implied:

> "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' [Citation omitted.] In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law [citation omitted] or if federal law so thoroughly occupies a legislative field" as to make reasonable the inference that Congress left no room for the States to supplement it."' [Citations omitted.]" *Cipollone*, 420 L. Ed. 2d at 422-23.

FIFRA appears at 7 U.S.C. § 136 *et seq.* FIFRA was originally enacted in 1947, and the Department of Agriculture was responsible for its enforcement. See *Papas v. Upjohn Co.*, 926 F.2d 1019, 1022 (11th Cir. 1991) (*Papas I*). It was intended as a licensing and labeling statute for pesticides. *Shaw v. Dow brands, Inc.*, 994 F.2d 364, 369 (7th Cir. 1993). In 1972, FIFRA was

completely revised and enforcement responsibility was transferred to the Environmental Protection Agency (EPA). Two purposes of the 1972 revisions were to "'(A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide regulation to actions entirely within a single State.' S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993." *Papas I*, 926 F.2d at 1022.

Among the provisions of FIFRA are comprehensive requirements concerning the content of labels affixed to products.

> "FIFRA provides a detailed scheme for regulating the content of an herbicide's label. All herbicides sold in the United States must be registered for use by the EPA & U.S.C. § 136a(a). The EPA has promulgated comprehensive labeling requirements governing the scope, content, wording and format of herbicide labeling. 40 C.F.R. § 156 (1992). The manufacturer itself designs and formulates the content of the label, and must file with the EPA a statement which includes 'the name of the pesticide,' 'a complete copy of the labeling of the pesticide, a statement of all claims to be made for it and any directions for its use,' and 'a full description of the tests made and the results thereof upon which the claims are based.' 7 U.S.C. § 136a(c)(1)(B)-(D)." *King v. E.I. Dupont de Nemours and Co.*, 994 F.2d 1346, 1347 (1st Cir. 1993).

See also *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993) (*Worm II*) ("In addition, it is a violation of FIFRA for any person to alter, in whole or in part, any required labeling. 7 U.S.C. § 136j[a][2].").

Although FIFRA provides a comprehensive scheme for regulating pesticides, Congress gave certain regulatory power to the states and also withheld certain power from the states. 7 U.S.C. § 136v (1988) provides in part:

> "(a) **In general** A state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.
>
> "(b) **Uniformity** Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."

Plaintiff argues that the preemption doctrine applies only to positive requirements imposed by states; common-law damages actions are not positive enactments imposed by states. Plaintiff asserts that FIFRA does not indicate a legislative intent to preempt common-law actions. Plaintiff also points to subsequent legislative activity to support his position against preemption. Although a majority of courts addressing FIFRA preemption prior to the United States Supreme Court decision in *Cipollone*, 120 L. Ed. 2d 407, held against preemption, plaintiff acknowledges that the majority of courts since *Cipollone* have held that FIFRA does preempt some state law actions. Federal, rather than state, law governs whether and to what extent FIFRA preempts a cause of action arising out of a failure to warn.

In *Cipollone*, the Supreme Court construed the preemptive effect of the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969. The 1965 Act mandated the following warning in § 4: "Caution: Cigarette Smoking May Be Hazardous to Your Health." 120 L. Ed. 2d at 421. The preemptive provisions in § 5 of the 1965 Act provided in part:

> "'(a) No statement relating to smoking and health, other than the statement required by § 4 of this Act, shall be required on any cigarette package.
>
> '(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" 120 L. Ed. 2d at 421.

The 1969 Act strengthened the mandated warning and modified the preemption provision by replacing sub§ (b) with the following provision:

> "'(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" 120 L. Ed. 2d at 422.

The plurality (Rehnquist, C.J., and Stevens, White, Blackmun, O'Connor, Kennedy, and Souter, JJ.) held that the 1965 preemption provision "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b))." 120 L. Ed. 2d at 424. Thus, only positive enactments that mandate particular warnings were preempted, and state law damages actions were not preempted under the 1965 Act. 120 L. Ed. 2d at 424.

A different result was reached with respect to the preemptive effect of the 1969 Act. The plurality (Rehnquist, C.J., and Stevens, White and O'Connor, JJ., with Scalia and Thomas, JJ. concurring in part and dissenting in part) held that plaintiff's common-law damages actions were preempted to some extent. Three justices would have found no preemption, four justices would have found preemption of some of plaintiff's claims, and two justices would have found preemption of all of plaintiff's claims. Thus, the plurality holding of the Court was that some of plaintiff's common-law damages claims were preempted and some were not.

The plurality reasoned that the plain language of the preemptive provision in the 1969 Act was much broader than the language in the 1965 Act. The 1965 Act barred only "statements" but the 1969 Act barred "requirement[s] or prohibition[s]." Moreover, the 1965 Act related only to "advertising" while the 1969 Act related to "advertising or promotion." 120 L. Ed. 2d at 425. The plurality found no distinction between positive enactments and the common-law and stated, "[C]ommon law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such provisions do not

impose 'requirements or prohibitions.'" 120 L. Ed. 2d at 426. The plurality also recognized that the phrase "state law" includes the common-law as well as statutes and regulations. 120 L. Ed. 2d at 426.

The plurality set forth the following "test" to determine which of plaintiff's claims were preempted: "[W]e ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." 120 L. Ed. 2d at 427. The plurality held that plaintiff's failure to warn claims were preempted but claims based "solely on respondents' testing or research practices or other actions unrelated to advertising or promotion: were not preempted. 120 L. Ed. 2d at 428. Plaintiff's advertising and promotion which minimized the health hazards of smoking was also preempted. 120 L. Ed. 2d at 431.

The majority of courts since *Cipollone* have held that common-law actions based on inadequate labeling or failure to warn are preempted by FIFRA. See, *e.g.*, *MacDonald*, 27 F.3d 1021; *Worm II*, 5 F.3d 744; *King*, 996 F.2d 1346; *Shaw*, 994 F.2d 364; *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied* 126 L. Ed. 2d 248 (1993) (*Papas II*); *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir.), *cert. denied* 126 L. Ed. 2d 30 (1993) (*Arkansas-Platte II*). Of note prior to the *Cipollone* decision are *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 959 F.2d 158 (10th Cir. 1992) (*Arkansas-Platte I*); *Papas I*, 926 F.2d 1019; and *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cart. denied* 469 U.S. 1062 (1984).

In *Ferebee*, the court held that FIFRA did not expressly or implicitly preempt a state damages action based on inadequate labeling. The court stated: "The fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* as well." 736 F.2d at 1540. Despite the FIFRA prohibition against imposing labeling requirements in addition to those mandated by the EPA, the court reasoned that a state "could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that

approved by the EPA." 736 F.2d at 1541. A verdict imposing liability "does not command Chevron to alter its label — the verdict merely tells Chevron that, if it chooses to continue selling [its product] in Maryland, it may have to compensate for some of the resulting injuries. [I]t is not equivalent to a direct regulatory command that Chevron change its label." 736 F.2d at 1541. The court also pointed out the savings clause in 7 U.S.C. § 136v(a) permitting states to impose more stringent constraints on the use of products approved by the EPA and stated:

> "[I]f a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries resulting from *use* of a pesticide, federal law stands as no barrier . . . As a result, [a state] is entitled to control the use of [a product] for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." 736 F.2d at 1541.

See also *Ciba-Geigy Corp. v. Alter,* 309 Ark. 426, 834 S.W.2d 136 (1992) (following *Ferebee,* common-law tort actions are not preempted as state tort law serves different purpose that FIFRA).

Papas I, 926 F.2d 1019, reached a different result. The Eleventh Circuit held that FIFRA impliedly preempted state common-law tort claims for inadequate labeling. The court concluded that Congress had occupied the entire field of labeling regulation and that a jury award of damages would result in direct conflict with federal law. 926 F.2d at 1025. The Court stated:

> "A jury determination that a label was inadequate would require that the manufacturer change the label or risk additional suits for damages. Such a change, if permitted by the EPA, would destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling because the warning label for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides." 926 F.2d at 1025-1026.

The court concluded that allowing state common-law damages actions based on inadequate labeling would permit a jury to do what the state legislature and state administrative agencies cannot do: impose requirements for labeling pesticides. 926 F.2d at 1026.

The United States Supreme Court granted *certiorari* in *Papas I* and vacated the judgment and remanded for further consideration in light of *Cipollone*. *Papas v. Zoecon Corporation*, ___ U.S. ___, 120 L.Ed. 2d 892, 112 S. Ct. 3020 (1992). In *Papas II*, 985 F.2d 516, the Eleventh Circuit held that FIFRA expressly preempts state common-law damages claims based on inadequate labeling. Acknowledging *Cipollone's* holding that common-law damages actions are a form of state regulation, the *Papas II* court held that "[t]o the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's 'labeling or packaging' failed to meet a standard 'in addition to or different from' FIFRA requirements, § 136v preempts the claims." 985 F.2d at 518. Under the court's analysis, not only were claims based solely on inadequate labeling preempted, but also claims based on failure to warn by means other than labeling were preempted.

> "[A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends." 985 F.2d at 519.

Moreover, the court found that claims based on breach of implied warranty were preempted because, unlike in *Cipollone* where the plurality held that an express warranty was imposed by the warrantor rather than the State, an implied warranty is a requirement imposed under state law. *Papas II*, 985 F.2d at 519. However, claims that did not challenge labeling and packaging were not preempted. 985 F.2d at 520.

Arkansas-Platte I, 959 F.2d 158, was also decided prior to *Cipollone*. The court declined to follow *Ferebee* and rejected *Ferebee's* "choice of reaction" analysis. As with *Papas I*, the United States Supreme Court granted *certiorari* in *Arkansas-Platte I* and

vacated the judgment and remanded for further consideration in light of *Cipollone. Arkansas-Platte & Gulf v. Dow Chemical Co.*,___ U.S. ___, 121 L.Ed. 2d 235, 113 S. Ct. 314 (1992). In *Arkansas-Platte II*, 981 F.2d 1177, the Tenth Circuit reaffirmed *Arkansas-Platte I*. The court found that the labeling provision in 7 U.S.C. § 136v(b) is as inclusive as the preemptive provision in the 1969 Act construed in *Cipollone*. Although the words of the two preemptive provisions are different, "their effect is the same." 981 F.2d at 1179. The court stated:

> "[A] state common-law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common-law duty is no less a 'requirement' in the preemption scheme than a state statute imposing the same burden. The objectives of the common-law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label. That a common-law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we believe it only logical to hold that the common-law duty to warn is subjected to the same federal preemptive constraints as a state statute." 981 F.2d at 1179.

Thus, the court held that FIFRA expressly preempts state tort claims based on labeling and packaging.

Other courts since *Cipollone* have also found that FIFRA preempts state law damages actions, either expressly or impliedly. For example, in *Shaw*, 994 F.2d at 370-71, the court held that the preemptive language of FIFRA is as sweeping as the preemptive provision in the 1969 Act construed in *Cipollone*. The court held that FIFRA expressly preempts state law damages actions based on labeling.

In *King*, 996 F.2d at 1347, the plaintiffs alleged negligent failure to warn and strict liability claims; however, plaintiffs conceded that the sole basis of their claims was the defendants' failure to provide adequate warnings. The First Circuit, discussing

Cipollone, held that FIFRA preempts state law tort claims based on failure to provide adequate warnings. 996 F.2d at 1349. The court found support for its conclusion in the legislative history of the 1972 amendments to FIFRA:

> "The Senate Committee Report on the provision stated that section 136v(b) 'preempts any State or local government labeling or packaging requirements differing from such requirements under the Act.' S. Rep. No. 920970, 92d Cong., 2d Sess. (872), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4092, 4128. *See also* S. Rep. No. 92-838, 92d Cong., 2d Sess. 30 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021 (the provision 'preempts any State labeling or packaging requirements differing from such requirements under the Act'). The House Committee Report stated: '[i]n dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging.' H.R. Rep. No. 92-511, 92d Cong., 2d Sess. 16 (1971), U.S. Code Cong. & Admin. News 1972, p. 3993." 996 F.2d at 1349-50.

Citing *Papas II*, *Arkansas-Platte II*, and *Shaw* with approval and finding that *Ferebee* was not persuasive (and also noting that *Ferebee* was decided prior to *Cipollone*), the court held that plaintiffs' claims were preempted by FIFRA.

In *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (*Worm II*), plaintiffs' claims included negligence (negligent failure to test, negligent manufacture, negligent marketing, and negligent failure to warn) as well as breach of express and implied warranty claims and a strict liability claim that the product was defective due to inadequate warnings. In *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992) (*Worm I*), decided five days before *Cipollone*, the Fourth Circuit held that FIFRA preempts enforcement or establishment of a common-law duty which would impose a labeling requirement. See *Worm II*, 5 F.3d at 747. The court remanded the case to the district court to

determine which of plaintiffs' claims were preempted. On appeal after remand, the court reaffirmed its decision that FIFRA preempts state law claims based on failure to warn or communicate information about a product through its labeling. *Worm II*, 5 F.3d at 747. The court created a "test" for determining whether a claim is preempted: "[T]he issue may nevertheless be resolved by looking to, as one factor, whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label." 5 F.3d at 747-48. The court determined that plaintiffs' claims involving a challenge to the adequacy of the warnings on the labeling or other materials distributed with the products were preempted. The court agreed with the *Papas II* court and extended the preemptive effect of FIFRA to claims based on the adequacy of warnings on materials other than the product labels. 5 F.3d at 748. However, the court held that claims based on negligent testing, formulation, and manufacture were not preempted. 5 F.3d at 749.

Finally, *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994), held that FIFRA expressly preempts state damages actions based on labeling and failure to warn which would impose or effect different or additional labeling requirements. Plaintiffs set forth an argument similar to the "choice of reaction" analysis in *Ferebee*, which the Fifth Circuit rejected: "If plaintiffs could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA; it cannot be presumed that businesses wish to bring about their own economic suicide." *MacDonald*, 27 F.3d at 1025.

Other post-*Cipollone* decisions addressing preemption include *Kolich v. Sysco Corp.*, 825 F. Supp. 959 (D. Kan. 1993) (failure to warn claims preempted); *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992) (only positive enactments concerning labeling preempted; failure to warn claim is not a labeling requirement and is not preempted); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y.1992) (express preemption to some extent, but no implied preemption; court seems to indicate that strict liability claim based on risk-utility test would not be preempted); *Yowell v. Chevron Chemical Co.*, (836 S.W.2d 62 (Mo. App. 1992) (plaintiffs' claims challenged the adequacy of pesti-

cide labels; court held that FIFRA preempted all of plaintiffs' claims, including strict liability claim, because Congress intended to occupy the field of pesticide labeling; court rejected the *Ferebee* "choice of reaction analysis); *Davidson v. Velsicol Chemical,* 108 Nev. 591, 834 P.2d 931 (1992), *cart. denied* 123 L. Ed. 2d 650 (1993) (FIFRA impliedly preempts state tort law actions; court found *Cipollone* not instructive).

The thorough discussion of the preemption analysis set forth in *Papas II, Arkansas-Platte II,* and *King* is persuasive. § 136v(b) prohibits states from imposing or continuing any requirement for labeling or packaging different from those required under FIFRA. As the decision in *Cipollone* makes clear, state law tort claims may constitute "requirements." "[A] state common-law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common-law duty is no less a 'requirement' in the preemption scheme than a state statute imposing the same burden." *Arkansas-Platte II,* 981 F.2d at 1179. Thus, any state law tort claim which affects the labeling or packaging of the 2,4-D products involved here is preempted by FIFRA.

The plaintiff points to isolated statements from the legislative history of the 1972 amendments to FIFRA as well as subsequent legislative history to support his contention that state law damages actions are not preempted. On the contrary, the legislative history supports the conclusion that state law tort claims are preempted. See, *e.g.,* H.R. Rep. No. 511, 92d Cong., 2d Sess. 1-2 (1972); ("State authority to change Federal labeling and packaging is completely preempted.'); H.R. Rep. No. 511, 92d Cong., 2d Sess. 16 (1972) ("[T]he Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging."); S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4092, 4128 (§ 136v(b) "preempts any State or local government labeling or packaging requirements differing from such requirements under the Act."); S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021 (§ 136v(b) "preempts any State labeling or packaging requirements differing from such requirements under the Act."). Plaintiff's reliance on subsequent legislative history showing an intent that common-law causes of action are not preempted is also misplaced. The plain language of §

136v(b) and its legislative history show a preemptive intent, and subsequent legislative history cannot negate that intent. State law tort claims based on labeling or packaging constitute "requirements for labeling or packaging," and such claims are expressly preempted by § 136v(b).

Plaintiff also argues that reliance on the post-*Cipollone* line of cases holding that FIFRA preempts state damages actions is inappropriate because those cases ignore that the Acts construed in *Cipollone* did not have a savings clause similar to the one found in FIFRA, § 136v(a). This argument fails as well. FIFRA does contain a savings clause giving states the power to regulate the sale or use of products as long as states do not permit a sale or use prohibited by FIFRA, whereas the 1969 Act construed in *Cipollone* contained no such provision. However, the preemptive provision in § 136v(b) expressly narrows and limits the grant of power to states in § 136v(a). *Cipollone* holds that state law damages actions constitute "requirements," and this holding is sound despite the presence or lack of an express savings clause. A common-law tort claim which challenges the labeling or packaging of products governed by FIFRA constitutes a "requirement for labeling or packaging" barred by § 136v(b) notwithstanding the general grant of power in § 136v(a).

Next, plaintiff cites several decisions in which the United States Supreme Court found no preemption "where preemption will leave a person with no remedy for common-law wrongs." See *International Paper Co. v. Ouellette,* 479 U.S. 481, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 84 L. Ed. 2d 169, 105 S. Ct. 1245, *reh. denied* 471 U.S. 1062 (1985); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). Plaintiff discusses *Silkwood* where the Court found no Congressional intent to interfere with state common-law remedies and stated, "This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood,* 464 U.S. at 251. Plaintiff seems to reason that preemption of a state remedy cannot be found unless Congress has provided an alternative remedy. However, § 136v(b) and its legis-

lative history clearly evince an intent to preempt any requirements concerning labeling and packaging beyond the requirements of FIFRA. State law damages actions constitute requirements. The preemptive effect is clear notwithstanding Congress' failure to provide an alternative remedy. In any event, plaintiff has a cause of action for such things a negligent testing, defective design, and manufacturing defects.

Finally, plaintiff argues that the goal of a jury award is compensation rather than regulation. Plaintiff reasons that the "choice of reaction" analysis set forth in *Ferebee* indicates that a state common-law tort award does not solely impose a "requirement" concerning labeling but rather serves the purpose of compensation. This "choice of reaction" analysis was expressly rejected in *MacDonald,* 27 F.3d at 1025; *Arkansas-Platte I,* 959 F.2d at 162; *Yowell*, 836 S.W.2d at 65; and *Davidson*, 108 Nev. at 601. One goal of a jury award may be compensation, but the award has a substantial regulatory effect. A defendant found liable will most certainly take steps to avoid liability in the future. Thus, a defendant found to have failed to warn of the dangers of its product will certainly seek to amend the label of that product. Much can be said as to why such a practice should be encouraged. However, we are not writing on a clean slate. The preemption issue is a federal issue and all of the United States Circuit Courts that have considered the issue (1st, 4th, 5th, 10th, and 11th, plus our own United States District Court for the District of Kansas), have held against plaintiff's position. Congress, of course, can change the result by amending FIFRA. An example of a savings clause on common-law actions is set out and discussed by the Supreme Court of Arizona in the case of *Hernandez-Gomez v. Leonardo,* 177 Ariz. Adv. Rep. 5, ___ P.2d ___ (1994).

Amici curiae Trial Lawyers for Public Justice and Public Citizen advance arguments not made by plaintiffs in urging this court to find that state law damages actions are not preempted by FIFRA. First, *amici* point out that § 136v(a) gives states the power to "regulate" the sale or use of products. Because § 136v(b) begins with the words "Such state," that § limits the preemption to states which are regulating under § 136v(a). Because "regulate" refers only to positive legislative or rulemaking actions, the term "requirements" in § 136v(b) is limited to positive enactments and

does not extend to common-law causes of action. See, *e.g., Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298.

A similar argument was rejected in *King v. E.I. Dupont v. de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993):

> "Subsection (a), however, is a grant of authority to the states to regulate the 'sale or use' of pesticides, not a limitation upon the preemptive effect of subsection (b). The word 'Such' in subsection (b) does not limit to state regulation the state 'requirements for labeling or packaging' which that section preempts."

We agree. § 136v(a) does give authority to states to regulate the sale or use of products. However, § 136v(b) expressly prohibits states from imposing or continuing in effect any requirements concerning labeling or packaging beyond the requirements of FIFRA. A state law damages action based on a claim of inadequate labeling constitutes a "requirement" and therefore is preempted by § 136v(b).

Amici curiae also argue that a state law damages action for failure to warn does not impose a requirement for labeling and packaging beyond that required by FIFRA. Under FIFRA, the EPA does not design the labels affixed to products; rather, companies seeking to register products devise the labels affixed to their products. FIFRA requires labels to contain adequate warnings, and registrants have an ongoing duty to ensure that their labels provide adequate warnings. A jury determination that a registrant failed to warn is merely a finding that the product was "misbranded" because the product did not provide adequate warnings. A state damages action provides a means of compensating those harmed by products which are misbranded in violation of FIFRA. Thus, a state law damages action for failure to warn imposes no requirements in addition to or different from those required under FIFRA. That the result of liability is a label change is not a requirement in addition to or different from FIFRA requirements, according to the *amici*, because FIFRA itself places on registrants the obligation to ensure their product labels provide adequate warnings.

The Eleventh Circuit in *Papas I* and *Papas II* rejected this argument.

> "For EPA-registered pesticides, the warning and use statements present on the labels indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose 'any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.' *See* 7 U.S.C.A. §§ 136(q)(1)(F), 136(q)(1)(G), 136(bb); 40 C.F.R. §§ 156.10(h), 156.10(i). Thus a jury determination, via a state common tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks. Such a jury determination is also in direct conflict with the Congressional intent that *the EPA Administrator* determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides." *Papas I,* 926 F.2d at 1025.
>
> "As we noted in *Papas I,* it is for the EPA Administrator, not a jury, to determine whether labelling or packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made. *See Papas I, supra,* 926 F.2d at 1026 n.8. States may not interfere with the methods designed by Congress to achieve FIFRA's goals. [Citation omitted.] We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures." *Papas II,* 985 F.2d at 519.

A jury verdict finding that a product's label or warnings were inadequate directly conflicts with the FIFRA scheme vesting the EPA Administrator with determining which products to register and with approving the labels affixed to those products. FIFRA defines misbranded products in 7 U.S.C. § 136(q) (1988). It is unlawful to distribute or sell any "misbranded" products or to alter any label required by FIFRA. 7.U.S.C. § 136j(a)(1)(E) and

136j(a)(2)(A) (1988). Civil penalties for violations of FIFRA are assessed by the EPA Administrator. 7 U.S.C. § 136*l*(a)(1) (1988). Thus, any common-law cause of action in which the labeling of a product regulated by FIFRA is alleged to be inadequate necessarily conflicts with the EPA Administrator's authority to determine whether labeling is inadequate or whether a product is misbranded.

Having held § 136v(b) preempts a state tort claim imposing requirements for the labeling and packaging of a defendants' 2,4-D products in addition to or different from FIFRA requirements, the next question is this: Which of plaintiff's claims constitute requirements concerning labeling or packaging?

It is not contested that defendants' labels complied with FIFRA requirements and were approved by the EPA Administrator, though defendants admit that their labels and other warnings did not warn that the products could cause cancer. There are no labels in the record and no evidence was introduced as to what was set out in the labels. However, plaintiff claims that the defendants' duty to warn could have been accomplished by means other than labeling and, therefore, a general failure to warn claim is not preempted. For example, plaintiff claims, defendants could have warned the public by advertisements or other generalized means; be press releases or advisory circulars to retailers for dissemination to the buying public; by appropriate store displays, shelf placards or counter signs; by limiting sale of the product so that the sale would not exceed the scope of potential buyers who would not be adequately warned by labels on the product; or by disseminating any other type of warning which did not per se require that it be affixed by a label. Plaintiff cites *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128.

The *Burke* court stated:

> "Applying the somewhat subtle distinctions of *Cipollone,* if EPA-approved labels were in fact affixed to the relevant containers, plaintiffs may not claim that defendants' products were mislabeled. If, however, warnings to the trade, warnings apart from labels or packaging, limitation on sales to professionals, or other protections falling generally within the ambit of warnings

should have been used when the content of the label was fixed by EPA there remains a liability question for the trier of fact. [Citation omitted.]" 797 F.Supp. at 1140.

The reasoning of *Papas II* is more persuasive. There, the court stated:

> "[A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging . . . Plaintiffs may not interfere with the FIFRA scheme by bringing a common-law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also pre-empted by FIFRA." 985 F.2d at 519.

See *Worm II*, 5 F.2d at 748. If defendants are required to give warnings by means other than labeling, those same warnings should be included in labeling. Thus, any negligence or strict liability failure to warn claim based on a claim that communication by means other than labeling was inadequate necessarily challenges the label and is preempted by § 136v(b) of FIFRA.

The trial court also held that plaintiff's strict liability claim was inextricably related to the issue of labeling and therefore that claim was preempted as well. The court's reasoning was based on PIK Civ. 2d 13.21 (1993 Supp.), which recommends the following jury instruction in strict products liability cases:

> "A (manufacturer) (seller) who sells a product in a defective condition unreasonably dangerous to the (user) (consumer) is subject to liability for physical harm (or property damage) thereby caused to the ultimate (user) (consumer) . . . .

> "A product is in a defective condition if, at the time it leaves the (manufacturer's) (seller's) hands, it is in a condition which is unreasonable dangerous to the ordinary user.
>
> "A condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.
>
> "The defect may be (in the product's preparation) (in the product's container or packaging) (in the instructions or warning necessary for the product's safe use)."

This instruction defines "unreasonably dangerous" according to the "consumer expectation test." The instruction is based on *Lester v. Magic Chef, Inc.* 230 Kan. 643, 641 P.2d 353 (1982), a 4-3 decision. Only two members of the present Kansas Supreme Court were on the *Lester* court, and they were on the majority. A recent California case rejects the "ordinary consumer expectations" instruction in complex products liability cases. That case presents a different approach and would be worthy of discussion were it not for the fact this issue is otherwise disposed of. See *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298 (1994).

Plaintiff sought a pretrial ruling on a question of law, arguing that his contention that 2,4-D causes non-Hodgkin's lymphoma is a sufficient "defect" to state a strict liability claim without having to show a specific defect. The trial court agreed that plaintiff did not need to show a more specific defect than that defendants' 2,4-D products cause non-Hodgkin's lymphoma. This ruling is the subject of defendants' cross-appeal.

Based on the trial court's ruling on plaintiff's pretrial question of law, defendants sought a pretrial ruling. Defendants argued that if the plaintiff was not required to prove a specific defect, the test for strict liability set forth in PIK Civ. 2d 13.21 (1883 Supp.)

was essentially a "pure consumer expectation test." Defendants reasoned that under the "pure consumer expectation test, " the plaintiff would be required to show that defendants' products were dangerous to an extent beyond that contemplated by the ordinary consumer. Because ordinary consumers base their understanding of the dangers of a product according to warnings communicated to them, and because warnings are communicated to consumers by labels, defendants reasoned that plaintiff's claims were preempted by FIFRA.

The trial court agreed, stating:

> "[I]t seems to me that the question presented by the defense is within — the context of the answer to the question posed by the defense in this case, is within the context of the labeling, the packaging, and the communicating that's done by the manufacturers and sellers of these chemicals to the purchasers and to the community.
>
> "And I'm persuaded today, that the question of the extent of the danger inherent in the product as set forth in the test articulated in PIK instruction 13.21 is so inextricably tied to the labeling, the packaging, that it's unavoidable for the jury to decide the question about the extent of the danger in the product without considering the labeling and the packaging.
>
> "And once I arrive at that conclusion . . . that brings me to — unavoidably, to the conclusion that the preemption is going to apply to this part of the case also . . . ."

The trial court's ruling was based on the defendants' characterization of plaintiff's strict liability test under the facts of this case as a "pure consumer expectation test." We question whether there is such a thing as a strict liability claim based on a "pure consumer expectation test." As the PIK instruction and the discussion later in this opinion make clear, a strict liability claim requires proof of a defect. There are three types of defects: design, manufacturing, and warning defects. The effect of plaintiff's request for a pretrial ruling that he did not need to show a specific defect was

to concede that he could not show a design defect. Plaintiff made no claim of evidence to prove a manufacturing defect. Thus, the only defect plaintiff could show was a warning defect. A strict liability warning defect claim is preempted under FIFRA. Therefore, the trial court's holding that all of plaintiff's claims were preempted under FIFRA was correct, though not because of the application of a "pure consumer expectation test."

The *Worm II* court aptly stated the test for determining whether a claim is preempted under FIFRA:

> "The line between a claim for mislabeling and a claim for a defective product may not always be clear . . . [T]he issue may nevertheless be resolved by looking to, as one factor, whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label." 5 F.3d at 747-48.

If in seeking to avoid liability the manufacturer would alter the label of its product, a state law damages action imposing liability would impose a requirement for labeling beyond the FIFRA requirements. Such an action is preempted under FIFRA. However, if in seeking to avoid liability the manufacture would alter the product itself, rather than the product's label, a state law damages action imposing liability would impose no requirement for labeling beyond the FIFRA requirements, and § 136v(b) would not preempt such an action.

Generally, in seeking to avoid liability under a design defect strict liability action, a manufacturer would alter the design of its product rather than its label. Therefore, a design or manufacturing defect strict liability action is not preempted under FIFRA. However, in seeking to avoid liability under a warning defect strict liability action, a manufacturer would choose to alter the warnings associated with its product rather than alter the product itself, and the action would be preempted under FIFRA. Here, plaintiff did not claim he could prove a design defect, and his warning defect claim is preempted.

In conclusion, it is clear that § 136v(b) of FIFRA preempts state law damages actions which impose labeling requirements beyond the FIFRA requirements. Negligent failure to warn claims and strict liability failure to warn claims necessarily impose requirements concerning labeling because to avoid liability a manufacture would alter the labels affixed to its products; therefore, such claims are preempted under FIFRA. Design defect strict liability claims, on the contrary, do not impose requirements concerning labeling and such claims are not preempted under FIFRA. The plaintiff contends he has a viable strict liability claim, plaintiff's only strict liability claim is one alleging a warning defect. Because all failure to warn claims are preempted under FIFRA, plaintiff has no claim which survives preemption.

II. IS FIFRA UNCONSTITUTIONAL?

Plaintiff argues that if this court finds his claims preempted under FIFRA, this court must find FIFRA unconstitutional. The trial court rejected this argument.

In his brief, plaintiff frames this issue as follows: "If it is determined that Congress intended FIFRA to preempt all state damages claims, then FIFRA must be found to be unconstitutional as violative of the Fifth Amendment's Due Process Clause." The simple answer to this issue is that FIFRA does not preempt *all* state damage claims; rather, FIFRA preempts only those state damage claims that impose different or additional labeling requirements. Claims based on design defects, manufacturing defects, and failure to test, for example, are not preempted.

Plaintiff points out that he abandoned his failure to test claim for the reason that he could not meet his burden of proof "because, to the extent that plaintiff relied upon the narrow 'contamination' issue to support his 'defect' claim, his own expert could not state it was the contaminants that 'caused' the cancer." Plaintiff concludes, "It cannot rationally be stated that a plaintiff is 'left with' some claims, when, under the facts and law, it is obvious he cannot prevail upon those claims. Under the law and facts herein, the obvious effect of the trial court's application of FIFRA, § 136v(b), was to strip Jenkins of all of his common-law remedy or remedies." Plaintiff's inability to prove a cause of action is not equivalent to that cause of action being preempted.

Plaintiff initially asserted theories of negligence, failure to test, failure to warn, and strict liability. It is only negligent failure to warn and strict liability failure to warn claims which are preempted by FIFRA. Plaintiff still has viable causes of action to remedy the harm he allegedly suffered by defendants' products even though one theory of liability is preempted. The fact that plaintiff is unable to meet his burden on other theories is a result of plaintiff's lack of proof rather than a result of preemption.

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." Plaintiff reasons that a state law damages action is a "liberty interest" deserving of constitutional protection against abrogation without due process. Plaintiff quotes language from *Planned Parenthood v. Casey*, 505 U.S. ___, 120 L.Ed. 2d 674, 695, 112 S. Ct. 2791 (1992), where the Supreme Court stated:

> "Although a literal reading of the [Due Process] Clause [of the Fourteenth Amendment] might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them' [Citation omitted.] ['I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.' [Citation omitted.] '[T]he guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."' [Citations omitted.]"

Plaintiff points out that the Kansas Constitution recognizes a "fundamental constitutional right to have a remedy for an injury to person or property by due course of law." *Ernest v. Faler,* 237 Kan. 125, 131, 697 P.2d 870 (1985). Thus, the "long-recognized right to a remedy for the private, wrongful causation of serious personal injury should be deemed a liberty interest." Because, according to plaintiff, his right to a remedy by due course of law in this case is a fundamental right, the FIFRA provision preempting such a remedy must be narrowly tailored to serve a compelling state interest. The only interest exhibited by § 136v(b) is in promoting uniform labeling requirements. This interest, plaintiff asserts, is not compelling such that FIFRA must be interpreted as preempting his state law claims. Moreover, no quid pro quo is given in exchange for abrogating plaintiff's rights. Because preemption raises serious due process questions, plaintiff urges this court to construe FIFRA as not preempting his state law claims.

Plaintiff also points out that in *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 305, 111 L. Ed.2d 224, 110 S. Ct. 2841 (1990) (Brennan, J., dissenting), the United States Supreme Court held that freedom from unwanted medical attention is fundamental. See also *Cruzan,* 497 U.S. at 278 ("a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"). Plaintiff asks, "If Gary Jenkins has a fundamental right 'to determine what shall be done with one's own body' in the context of medical treatment, why should that right not extend also to this right to be free from repeated, unwanted exposures to a toxic, cancer causing chemical?"

Defendants assert that plaintiff's interest in his state law claim is a property, rather than a liberty, interest. Liberty involves attributes of personhood, see *Casey,* 120 L. Ed. 2d at 698, and a state law claim is not an attribute of personhood. Rather, a state law claim is at best a specie of property. That property interest does not arise until a final unreviewable judgment has been obtained. Defendants reason that the proper standard of review requires only a rational basis, rather than a compelling interest, fir the legislative action. Congress' belief that permitting states to regulate labeling and packaging of pesticides would interfere with its interest in uniform labeling and packaging requirements exclu-

sively controlled by the EPA "can hardly be said to be irrational."

Kansas does recognize a quid pro quo requirement when rights under the Kansas Constitution are modified: "[T]he legislature, under its power to act for the general welfare, may alter common-law causes of action and constitutional rights if it provides an adequate quid pro quo." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 361, 789 P.2d 541 (1990), *overruled in part on other grounds Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176 (1991). In *Samsel*, this court found that a statute limiting noneconomic damages to $250,000 gave a sufficient quid pro quo by requiring that a court not exercise its discretion to award less than $250,000 where a jury awards higher damages. 246 Kan. at 362. In *Bair*, this court recognized that if the legislature creates a statutory remedy and abolishes the common-law remedy, "[t]he legislature, once having established a substitute remedy, cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy." 248 Kan. at 844. Both of these Kansas cases involved rights arising out of the Kansas Constitution rather than the United States Constitution.

The United States Supreme Court has not recognized a quid pro quo requirement to the Due Process Clause:

> "Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common-law.' [Citations omitted.] The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.' [citation omitted], despite the fact that 'otherwise settled expectations may be upset thereby.' [Citations omitted.] Indeed, statutes limiting liability are relatively commonplace and have *consistently* been enforced by the courts. [Citations omitted.]" *Duke Power v. Carolina Env. Study Group*, 438 U.S. 59, 88 n.32, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978).

Although FIFRA does not provide an alternate cause of action for the failure to warn actions preempted by § 136v(b), there is no requirement under the United States Constitution that an alternate cause of action be established. Plaintiff's state law claim does not constitute a liberty interest or fundamental right deserving of heightened scrutiny. Rather, the FIFRA provision preempting state law damages actions concerning labeling is cloaked in a presumption of constitutionality and the burden is on plaintiff to show that § 136v(b) is wholly arbitrary and irrational in purpose and effect, *i.e.*, not reasonably related to a legitimate congressional purpose. *See Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986).

Plaintiff has not met his burden here. Congress has vested the EPA with regulating all aspects of pesticide labeling and packaging in furtherance of the legitimate interest of uniformity. Preemption of state law damages actions is reasonably related to this purpose. The FIFRA provision which preempts state law claims is not unconstitutional.

III. CROSS-APPEAL

Defendants perfected a cross-appeal from the trial court's ruling on plaintiff's pretrial question of law. Plaintiff argued to the trial court that because defendants were not claiming their 2,4-D products were unavoidably unsafe, plaintiff could establish a strict liability claim by showing that 2,4-D causes non-Hodgkin's lymphoma without proving a more specific defect. The trial court agreed.

Kansas has adopted the doctrine of strict products liability as set out in the Restatement (Second) of Torts § 402A (1964). *Brooks v. Dietz*, 218 Kan. 698, Syl. paragraph 1, 545 P.2d 1104 (1976). In *Mays v. Ciba Geigy Corp.*, 233 Kan. 38, 54, 661 P.2d 348 (1983), this court stated, "[T]he plaintiff, to present a prima facie strict liability case, must produce proof of three elements: (1) the injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed at the time it left the defendant's control." These elements are encompassed in the pattern instruction on strict liability. See PIK Civ. 2d 13.21 (1993 Supp.) PIK Civ. 2d 13.21 (1993 Supp.) was approved in *Siruta v. Hesston Corp.*, 232 Kan. 654, 668-69,

659 P.2d 799 (1983). The pattern instruction establishes three possible types of defects in strict products liability cases: "The defect may be (in the product's preparation) (in the product's container or packaging) (in the instructions or warnings necessary for the product's safe use)." These are commonly referred to as "design defects," "manufacturing defects," and "warning defects."

In *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982), a majority of this court adopted the test set forth in comment *i* to § 402A for determining whether a product is unreasonably dangerous in design defect cases. Comment *i* provides in part that strict liability under § 402A

> "applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

In *Lester*, this court acknowledged the requirement that a product be both defective *and* unreasonably dangerous. 230 Kan. at 650. This court rejected the plaintiff's argument that a risk-benefit test should be adopted for design defect cases, and instead adopted the comment *i* test, commonly referred to as the "consumer expectation test." 230 Kan. at 653.

This court has recognized the availability of the "comment *k*" exception to § 402A strict liability in cases of design defect. *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 285, 718 P.2d 1318 (1986). Comment *k* to § 402A provides in part:

> "*Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous . . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and

> proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonably risk."

Plaintiff here points out that the defendants did not raise the comment *k* exception as an affirmative defense in the trial court.

Plaintiff's argument here is that the defendants' 2,4-D products cause cancer. Essentially, plaintiff's argument is that he has to prove only that defendants' products cause cancer, and the burden then shifts to the defendants to argue that the products were unavoidably unsafe before plaintiff has to prove what kind of defect the products contain. Plaintiff argues that it is irrelevant whether this defect is classified as a design defect or manufacturing defect. However, it is clear that there is no manufacturing defect because plaintiff makes no claim that the products he used were somehow different than other 2,4-D products in their propensity to cause cancer.

Defendants point out that strict products liability requires proof that the product was defective. Defendants cite Beasley, Products Liability and the Unreasonably Dangerous Requirement, p.77 (1981); "[U]nder both negligence and strict tort liability the plaintiff must prove the injury was caused by the product, the product was defective, and the defect existed when the product left the hands of the defendant." If plaintiff is not required to prove a defect, defendants argue, plaintiff would be able to recover based merely on proof of causation, a result more akin to absolute liability than strict liability.

Defendants urge that to permit plaintiff to prevail on proof of causation alone, without a showing of a specific defect, leads to uncertainty and unfairness. Defendants argue that if plaintiff cannot prove any specific defect in the product, the proper theory is a warning defect. Defendants point out a similar holding in *Lenherr v. NRM Corp.*, 504 F. Supp. 165, 172 (D. Kan. 1980):

> "A product is 'defective' when it leaves the seller's hands in a condition not contemplated by the ul-

> timate consumer and as a consequence of such condition will be unreasonably dangerous to the consumer. Restatement (Second) of Torts § 402A, comment *g* (1965). The defect may arise from the design of the product. A product may also be defective without any ascertainable defect in the product and although the product was precisely what it was intended to be, if the manufacturer fails to give adequate and timely warnings as to the dangers or hazards which may result from a foreseeable use or misuse of the product. Restatement (Second) of Torts § 402A, comment *j* (1965).

Further, in *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 795 P.2d 915 (1990), the parties stipulated that the product was not contaminated and was in the form and content intended by the manufacturer. This court found that "[p]laintiff has presented no evidence to show that metrizamide had a design defect that, if corrected, could have posed less of a risk: and therefore held that defendant's product was an unavoidably unsafe comment *k* product. The only theory of liability remaining was the adequacy of the warnings. 247 Kan. at 120-21.

Defendants assert:

> "Strict liability in tort should only attach when, in the case of a claimed design defect, there was some aspect of the design of the product which could have been changed to make it safer; or in the case of a failure to warn, when the manufacturer, based upon knowledge available to him, should have provided adequate instructions for safe use; or in the case of a manufacturing defect, the product was not manufactured in conformity with its design."

According to defendants, Kansas cases addressing strict liability demonstrate that Kansas requires for design defect cases proof of some aspect of the design that could have been changed to make the product safer, and where the product could not be changed to make it safer, there is no design defect. Defendants cite *Savina*, 247 Kan. 105; *Johnson*, 239 Kan. 279; *Betts v. General Motors*

Corp., 236 Kan. 108, 689 P.2d 795 (1984); *Lester*, 230 Kan. 643; *Barnes v. Vega Industries, Inc.*, 234 Kan. 1012, 676 P.2d 761 (1984); and *Siruta*, 232 Kan. 654.

In *Savina*, this court gave comment *k* protection to the manufacturer of a contrast agent used in a medical procedure. We recognized that comment *k* only applies to design defect cases and that for comment *k* protection to apply, the product must be properly prepared and it must be accompanied by proper directions and warnings. 247 Kan. at 115. Recognizing that "the danger created by using the drug cannot be eliminated," we held that "due to its benefits, the drug can be marketed provided it is accompanied by 'proper directions and warnings.'" 247 Kan. at 122. A similar result was reached in *Johnson*, involving a polio vaccine:

> "Orimune, the Sabin-type vaccine, is an 'unavoidably unsafe product' that is an 'apparently useful and desirable product, attended with a known but apparently reasonable risk' as a matter of law. Public policy requires that the mere manufacture of the vaccine not be actionable on the ground of design defect. The trial judge should have heard the evidence on this issue outside the presence of the jury and made the determination thereon. There is no claim that the vaccine administered to plaintiff's child was improperly manufactured or that a defective product was delivered. The vaccine was properly prepared and marketed and was exactly what it was intended to be. As a matter of law there is no manufacturing or design defect in the product at issue herein." 239 Kan. at 286.

The other cases cited by defendants are design defect cases in which there was a claim of a safer design.

Plaintiff reasons that because defendants do not claim their products were unavoidably unsafe, the allegation that defendants' products cause cancer is a sufficient defect. "[I]t is plaintiff's allegation that the product causes cancer which is the 'defective condition' upon which plaintiff relies in support of his strict liability claim." Plaintiff asserts that in *Mays*, 233 Kan. 38, this court

recognized the viability of a "nonspecific defect" claim. Therefore, plaintiff reasons, he must merely prove that a "condition" of the product was unreasonably dangerous, and the fact that defendants' products cause cancer is just such a condition.

Plaintiff also cites *ISK Biotech Corp. v. Douberly,* 640 So. 2d 85 (Fla. Dist. App. 1994). In *Douberly*, the plaintiffs alleged their watermelon crop was burned by a fungicide registered under FIFRA. The court found plaintiffs' failure to warn claims preempted. However, a strict liability design defect claim was not preempted. The court stated:

> "[W]hen a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration.' [Citation omitted.] In other words, the malfunction itself constitutes evidence of a defect." 640 So. 2d at 88-89.

In response, defendants argue that a "nonspecific defect: theory, wherein a malfunction of the product is proof of a defect, applies only to manufacturing defect cases and not to design defect cases. *Mays*, relied upon by plaintiff, answered only the question of whether a manufacturing defect can be proven by circumstantial evidence.

The trial court's ruling that plaintiff need not prove a more specific defect than that defendants' 2,4-D products cause cancer effectively exempted plaintiff from having to prove defendants' 2,4-D products were defective. The ruling was in error.

The rationale for the doctrine of strict liability was stated in *Savina,* 247 Kan. at 114:

> "The public policy considerations underlying the doctrine of strict liability are that the manufacturer can anticipate and guard against the recurrence of hazards, that the cost of injury, which may be overwhelming to an injured individual, can be distributed by the manufacturer among the consuming public, and that the marketing of defective products should be discouraged."

Imposing liability for a product without identifying what aspect of that product is defective does not further these public policy considerations.

Plaintiff's argument is that if he proves that the defendants' 2,4-D products caused his cancer, an inference that the 2,4-D products were defective arises. In *Mays,* 233 Kan. at 54, this court recognized that manufacturing defects "may be proven inferentially, by either direct or circumstantial evidence." While defendants assert that this rule is limited to manufacturing defect cases, plaintiff reasons that it is not. It would appear that either a design defect or a manufacturing defect can be proven by circumstantial evidence. However, we disagree with *Douberly* to the extent it holds that the mere fact of an injury implies a design defect. *Douberly* talks about a product "malfunctioning." "Malfunction" indicates that a product performed other than as expected., and this lends itself more to a manufacturing defect argument than to a design defect argument, though the *Douberly* court made it clear plaintiff's claim was one of design defect. Inferring a defect from the fact of the injury, particularly where, as here, the product was exactly what the defendants intended and plaintiff makes no argument that the product could have been designed to more safely perform its intended function, is unsuitable.

The PIK instruction approved in *Siruta* defines "defective condition" as "a condition which is unreasonably dangerous to the ordinary user." "Unreasonably dangerous" is defined as "dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics." Thus, not only is "unreasonably dangerous" defined in terms of the consumer expectations test, but "defect" is also defined by the consumer expectations test. Assuming that plaintiff and other ordinary consumers did not know that defendants' 2,4-D products cause non-Hodgkin's lymphoma, it would seem that plaintiff has established that defendants' 2,4-D products were both in a defective condition and unreasonably dangerous. Indeed, plaintiff's counsel argued to the trial court that plaintiff's own testimony that he did not know the products caused non-Hodgkin's lymphoma would be

sufficient to sustain his burden of proof.

Plaintiff's characterization cannot be accurate. Plaintiff's construction would effectively read the last paragraph out of the PIK instruction: "The defect may be (in the product's preparation) (in the product's container or packaging) (in the instructions or warning necessary for the product's safe use)." This language is not mere surplusage. It shows that some specific defect must be established to prove a strict liability claim. This court's decision in *Siruta* provides support for this construction.

In *Siruta,* the plaintiff claimed that defendant's hay baler was defective because it was not designed with safety guards and shields to prevent injury. One issue on appeal concerned whether the trial court erred in permitting plaintiff's counsel to cross-examine defendant's expert witness about subsequent changes in the design of its hay baler. The subsequent changes included installing a guard. The defendant argued such evidence was of subsequent remedial measures inadmissible under K.S.A. 60-451. 232 Kan. at 666. This court disagreed, stating:

"In products liability cases, the plaintiff in sustaining its burden to prove that a product is defectively designed may properly show the *feasibility* of a safer design. [Citation omitted.] Logically, when defendant manufacturer's experts have testified that a particular design change is not feasible, it would seem that evidence of the incorporation of plaintiff's suggested design change in a later product of the defendant manufacturer would be highly relevant and admissible to prove its feasibility. In other words, in the field of products liability the rule excluding evidence of subsequent modifications has not been applied where such evidence is offered to show the technological or economic feasibility of alternative designs which would have prevented the injury." 232 Kan. at 667-68.

Generally, evidence of a safer alternative design seems to lend itself to a risk-benefit analysis. The risk-benefit analysis looks in part to whether there is a safer feasible alternative, whether such an alternative is cost effective, and whether there are risks associated with the alternative design. See *Lester,* 230 Kan. at 651. Evidence of a safer alternative design seems to have no place under the consumer expectations test, which merely looks to

whether the product was more dangerous than the ordinary consumer expected. However, *Siruta* clearly approves proof of a safer alternative design in design defect cases. *Siruta* was decided after this court adopted the comment *i* consumer expectations test, evidence of a feasible alternative design is admissible in design defect cases, though it probably is not required. Under the plaintiff's construction, however, there would be never be a need to show an alternative design because there is no need to show what about the design was defective. Clearly this is not a proper construction. While evidence of a safer alternative design is not required in all cases, there must be a specific claim concerning what aspect of the design was defective for a plaintiff to prevail on a strict liability design defect claim.

Plaintiff's allegation that defendants' 2,4-D products cause cancer is not sufficient to raise a claim of design defect, and the trial court erred in so holding. Plaintiff need not specifically prove a safer, cost-effective alternative unless defendants claim their products are unavoidably unsafe. Defendants have not claimed their products were unavoidably unsafe. (Defendants might not receive such protection because the doctrine requires proper warnings, and defendants here did not warn that their products could cause non-Hodgkin's lymphoma). However, the fact that defendants do not claim their products were unavoidably unsafe does not relieve plaintiff from his burden of proving that defendants' products were defective. Plaintiff has failed to identify what aspect of defendants' products was defectively designed. Therefore, plaintiff cannot prevail on a strict liability design defect claim.

Plaintiff makes no specific claim of a design or manufacturing defect strict liability claim. The only strict liability claim on which plaintiff has evidence is a warning defect claim. This claim is preempted by FIFRA.

Affirmed.

APPEAL NO. 94-71406-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

GARY W. JENKINS,
Plaintiff/Appellant/Cross-Appellee,
v.
AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY;
RHONE POULENC AG COMPANY;
PLATTE CHEMICAL COMPANY; and
FARMLAND INDUSTRIES, INC.,
Defendants/Appellees/Cross-Appellants.

REPLY BRIEF OF PLAINTIFF/APPELLANT/CROSS-APPELLEE GARY W. JENKINS

APPEAL FROM THE DISTRICT COURT OF
SEDGWICK COUNTY, KANSAS
HONORABLE KARL FRIEDEL
DISTRICT COURT CASE NO. 92 C 3037

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ARGUMENTS AND AUTHORITIES

I. DEFENDANTS' ATTEMPT TO CATEGORIZE PLAINTIFF'S CLAIM AS A "DESIGN DEFECT" CASE IS INCORRECT

Plaintiff submits that the defendants' attempt to label plaintiff's claim a "design defect" case is incorrect. Here, plaintiff alleges his long term use of a product caused a latent disease, to wit: cancer. It is therefore unimportant whether the label of "design defect" or "manufacturing defect" is placed on his claim. Beasley[1] is critical of such labeling and states:

> To the extent that a plaintiff is forced to prove which type of defect was involved, the public policy of strict tort liability is frustrated . . . If a distinction must be drawn, the policy should not be undermined where the need for the strict liability doctrine is greater. It is paradoxical to impose a more stringent test upon design defects, since "it is easier to see the 'defect' in a single imperfectly fashioned product than in an entire line badly conceived.[2]

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[1] Beasley, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT (ALI-ABA 1981).

[2] id at pg. 70.

Defendant is incorrect in asserting that "a design defect claim . . . requires plaintiff to identify some aspect of the design that could be changed to make it safer." (Defendants' brief, pg. 25). This assertion is contrary to the holding in *Mays v. Ciba- Giegy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983),
wherein our court recognized the viability of a "nonspecific" defect claim. *Mays*, 233 Kan. at pg. 50. It was implicitly rejected in *Lester v. Magic Chef*, 230 Kan. 643, 641 P.2d 353 (1982), when the plaintiff therein tried to prove a more reasonable design, and urged, without success, the adoption of the "risk-utility" balancing test.

Mays considered when a plaintiff may proceed upon circumstantial evidence. The Court holds a plaintiff must produce proof of three elements:

> (1) the injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; (3) the condition existed at the time it left the defendant's control" *Mays*, 233 Kan. at 50.

Plaintiff submits the cross-appeal's precise issue is whether plaintiff's allegation that 2,4-D's propensity to cause non-Hodgkin's lymphoma constitutes a "condition" of the product to support the "defect" element of a strict liability claim. If so, then plaintiff has stated a strict liability claim under Kansas law, and upon adequate proof, he can prevail without regard to the issue of warning.

This rationale was recently adopted by a Florida Court in a FIFRA case. The Court states:

> When a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration. . . Consequently, the Douberly's strict liability claim was based solely on the product's defective condition and was therefore independent from any theory pertaining to inadequate labeling. *Douberly v. ISK Biotech Corp*. Fla. Ct.App. First Dist. §93-312, motion to rehear en banc 7/6/94: 19 Fla. L. Weekly D1371, D1373.

Thus, with regard to the defendants' cross appeal, it is clear the trial court was correct in ruling that plaintiff's allegation that 2,4-D is capable of causing cancer, is an allegation of a defect sufficient to proceed upon a strict liability claim. However, the trial court erred in ruling that the consumer expectation test was inextricably linked to the issues of warning, and that therefore plaintiff's strict liability claim was preempted.

II. UNDER THE FACTS OF THIS CASE, THE PREEMPTION DOCTRINE, AS APPLIED, RESULTS IN A COMPLETE ABROGATION OF PLAINTIFF'S COMMON LAW CLAIMS

Defendants are disingenuous when they argue that they did not "assert" preemption to some of the claims asserted by plaintiff in the pretrial order. (Defendants' brief, pg. 23).

Plaintiff had asserted the defendants were negligent and strictly liable because they failed to test their products to make sure they were free from harmful contaminants. (Paragraph 2 and 4, pre-trial order, R. Vol.2, pg.110). Plaintiff did abandon this claim because, to the extent that plaintiff relied upon the narrow "contamination" issue to support his "defect" claim, his own expert could not state it was the contaminants that "caused" the cancer.[3] This is particularly relevant when considering the causation instruction of P.I.K. (Civil) §13.22(5). When plaintiff's own expert would be forced to testify, as defendants most assuredly would have asked, that "it cannot be stated, at present, that the failure to manufacture 2,4-D, free of toxic contaminants is what caused plaintiff's non-Hodgkin's lymphoma," plaintiff could then not show that the narrow "contamination" defect "caused" his injury. In addition, federal cases are holding that such "misbranding" claims are also "preempted" by FIFRA. See, *Papas v. Upjohn*, 985 F.2d F. 516, 518, footnote 2 (11th Cir 1993).

It cannot rationally be stated that a plaintiff is "left with" some claims, when, under the facts and law, it is obvious he cannot prevail upon those claims. Under the law and facts herein, the obvious effect of the trial court's application of FIFRA, §136v(b),

[3] The affidavit of Dr. Teitelbaum is attached as exhibit 1.

was to strip Jenkin's of all of his common law remedy or remedies, and the trial court so recognized. (R. Vol.5, pgs. 49-51).

III. PLAINTIFF'S CONSTITUTIONAL CLAIM IS BASED UPON A LIBERTY INTEREST; HE DOES NOT ALLEGE DEPRIVATION OF A "SPECIES OF PROPERTY"

Defendants' reply to plaintiff's constitutional challenge cites cases which involve situations where legislation is passed — after the filing of a plaintiff's claim — which affects the validity of the claim. This raises an issue of the constitutional validity of retroactive legislation. These cases are inapposite to plaintiff's constitutional claims herein. Plaintiff does not allege constitutional deprivation of property, or a species of property. However, a case cited by defendants does acknowledge "that Congress must comply with due process when abolishing or substantially modifying a common law cause of action." *Hammond v. U.S.*, 786 F.2d 8, 12 (5th Cir 1986).

Plaintiff concedes that because of the Supremacy Clause of the U.S. Constitution, Sec. 18, of the Kansas Constitution's Bill of Rights, is not a direct restraint upon Congress. However, the Kansas Constitution's promise of a remedy, *"for injury to person,"* by due course of law, is quite relevant in determining whether the asserted right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental",[4] and therefore deserving of liberty interest protection.

What is the "injury to person" that should be the subject of constitutional protection? Here, Jenkins asserts that his use from the mid 1960's to 1990 of a chemical that gave him cancer strikes at the core of values — i.e. "the integrity of an individual's person"[5] — which this Court and the U.S. Supreme Court have consistently held to be fundamental. Cases analyzing the "informed consent" doctrine are particularly instructive herein. In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, L.Ed.2d (1990), the Supreme Court examined whether the state's

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[4] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

[5] *Schmerber v. California*, 384 U.S.757, 772, 86 S.Ct. 1826, 1836-1837 (1966).

requirement of "clear and convincing" evidence of a desire to be removed from life-sustaining medical equipment conformed with a conceded liberty interest. Justice Brennan, in dissent, states:

> The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges . . . This right has long been 'firmly entrenched in American tort law' and is securely grounded in the earliest common law . . . 'Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment.' *Natanson v. Kline*, 186 Kan. 393, 406-407, 350 P.2d. 1093, 1104 (1960). Thus, freedom from unwanted medical attention is unquestionably among those principles "so rooted in the tradition and conscience of our people as to be ranked as fundamental.'. . . *Cruzan*, 110 S. Ct at 2865.

If Gary Jenkins has a fundamental right "to determine what shall be done with one's own body" in the context of medical treatment, why should that right not extend also to his right to be free from repeated, unwanted exposures to a toxic, cancer causing chemical?

Plaintiff submits the core issue herein — self determination — is a fundamental right, deserving of liberty interest protection. If this court so holds, defendant is simply incorrect is asserting that FIFRA, §136v(a) should be measured against a "rational basis test." Even Justice Scalia recognizes that:

> Respondents' 'substantive due process' claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the in-

fringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 113 S.Ct 1439, 1447 (1993).

The problem is, there is nothing in the legislative history, or the contemporaneous problems of the pesticide industry at the time of enactment of FIFRA, 1972, which supports the argument that FIFRA, §136v(b) is necessary, in light of its infringement on Jenkins' fundamental rights, "to serve a compelling state interest." id. There is no evidence, extant in 1972, which would allow this court to review, as it did in *Samsel v. Wheeler Transport Serv. Inc.*, 246 Kan. 336, 789 P.2d 541, the "availability of liability insurance which critics warn is threatened by the present tort system." id. at 339. In 1972, the "double digit" inflation of the middle and late 1970's, with their alleged affects on the premium pricing cycle of the insurance industry, had yet to appear. See, *Samsel*, 246 Kan. at 339-340. Defendants do not argue, nor can they, that Congress was merely prescient in foreseeing some grave danger to the financial health of pesticide sellers, or their insurers. Assuming, *arguendo*, that pesticide sellers, at present, face financial ruin from strict liability cases, does not illuminate whether, in 1972, their was a "compelling" reason for Congress to pass a law so affecting the fundamental rights of Mr. Jenkins.

In light of the significant constitutional issues, the alleged federal interest in "uniformity", which is described as the "most generic (and lightly invoked) . . . "[6] reason for invoking preemption, simply does not raise to the level of a compelling governmental interest.

IV. DEFENDANTS' CRITICISM OF "CHOICE OF REACTION" ANALYSIS IGNORES THE FACT THAT THE PRIMARY PURPOSE OF A JURY AWARD IS COMPENSATION

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[6] *O'Melveny & Myers v. F.D.I.C.*, ___ U.S.___, 114 S.Ct. 2048, 2055 (1994).

With regard to defendants' assertion that the "choice of reaction" analysis is discredited (Defendants brief, pg 13), plaintiff submits the wrong question is being asked. The proper question is, can the federal interest in uniform labeling requirements for the companies supplying the nearly 50,0000[7] registered pesticides be reconciled with the state's traditional interest in compensation for its injured citizens. The "choice of reaction analysis" advanced by defendants views a jury award *solely* in the context of its "regulatory" effect on labels. .

However, this analysis disregards the finding that the *primary purpose* of an award in Kansas is compensation, not deterrence (regulation) or retribution. Samsel v. Wheeler Transport Serv. Inc., 246 Kan 336, 338, 789 P.2d 541 (1990). See also, Smith v. Printup, 254 Kan 315, 866 P.2d 985 (1993). This analysis is similar to that followed in the *Silkwood*[8] case (see Plaintiff's original brief, pgs. 21-23).

CONCLUSION

The trial court was correct in ruling that plaintiff's allegation that the defendants' products caused cancer is a sufficient allegation of a defect to support a strict liability claim. The trial court erred in ruling that all of plaintiffs' claims are preempted.

FIFRA, §136v(b), as applied to the facts herein, is unconstitutional because it violates Jenkins' liberty interest as protected by the Fifth Amendment to the U.S. Constitution.

Respectfully submitted,

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[7] See Riden v. ICA Americas, Inc., 763 F.Supp. at 1508.
[8] Silkwood v. Kerr McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984).

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was served by hand-delivering the same, this _____ day of _____, 1994, addressed to:

Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th Avenue
Topeka, Kansas 66612
[Original + 15 Copies]

and by depositing same in the U.S. mail, postage prepaid, addressed to:

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_____
Mark A. Furney

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

GARY W. JENKINS,	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 92 C 3037
	)	
AMCHEM PRODUCTS, INC., et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF DANIEL T. TEITELBAUM, M.D.

Now, upon my oath, I hereby state:

1. Attached is my C.V. I am a practicing clinical toxicologist. I am board certified by the American Board of Medical Toxicology.

2. I have examined Mr. Gary Jenkins. I took a history from Mr. Jenkins regarding his past use of 2,4-D herbicide products and his use of other farm chemicals. I have also reviewed his medical records.

3. I have reviewed the medical literature, as well as some internal documents of defendants herein, particularly a document of Mr. Jean Noel Tabet, dated October 8, 1993. Based upon this review, and other information I have obtained, it is my opinion that during the time period Mr. Jenkins was exposed to 2,4-D, that the 2,4-D Mr. Jenkins was exposed to was contaminated with toxic substances, including various isomers of dioxin, dibensofurans and nitrosamines.

4. I have reviewed various epidemiological studies concerning whether exposure to 2,4-D and/or its contaminants can cause non-Hodgkin's lymphoma in humans. It is my opinion that it can, and in Mr. Jenkins' case it is more probable than not that his long-term exposure to 2,4-D significantly contributed to the causation of his non-Hodgkin's lymphoma.

5. I do not believe that the medical literature, at present, would support the proposition that the contaminants in non-Hodgkin's lymphoma. In other words, it cannot be stated, at present, that the failure to manufacture 2,4-D, free of toxic contaminants as mentioned in paragraph 3 is what caused Gary Jenkins' non-Hodgkin's lymphoma.

FURTHER AFFIANT SAYETH NOT.

/S/ Daniel T. Teitelbaum, M.D.
Daniel T. Teitelbaum, M.D.

Subscribed and sworn to before me this 24th day of January, 1994.

/S/ Joan L. Huxley
Notary Public

My appoint expires:

11/20/96

/ SEAL /

APPENDIX D -- STATUTES INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides, in pertinent part, as follows:

§ 136v. Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

§ 136(p) Label and labeling. --

(1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, and Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

§ 136. **Definitions**

For purposes of this act [7 U.S.C. 136, et seq.]

(q) **Misbranded** (1) A pesticide is misbranded if-

(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of this Act [7 U.S.C. § 136a(d)], is adequate to protect health and the environment.

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

(2)

No. 94-2061

In The

Supreme Court of the United States

October Term, 1995

GARY W. JENKINS,

Petitioner,

v.

AMCHEM PRODUCTS, INC., UNION CARBIDE AGRICULTURAL PRODUCTS CO., RHÔNE-POULENC AG COMPANY, PLATTE CHEMICAL COMPANY, and FARMLAND INDUSTRIES, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should review a decision of the Kansas Supreme Court that, consistent with the decisions of eight federal courts of appeals, narrowly holds that federal law preempts state tort law claims based upon a theory of failure to warn.

II. Whether this Court should review a decision of the Kansas Supreme Court determining, consistent with this Court's Supremacy Clause decisions, that no protected due process interest of petitioner was infringed by preemption of his state tort law claim and, consistent with this Court's decision in *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), that Congress need not provide an alternative remedy.

LIST OF PARTIES

Petitioner, Gary W. Jenkins, is an individual.

Respondent Farmland Industries, Inc. is a Kansas Corporation, and has the following non-wholly owned subsidiaries and affiliates: AG Processing Inc.; Alliance Farms Cooperative Association; Arlington Coop Exchange; B.C.'s Truck Plaza, Inc.; Big Country Feeds Ltd. Liability Co.; Broadcast Partners; Cenex/Farmland, Inc.; The Cooperative Finance Association, Inc.; Dakota Fuels, Inc.; Farm Kan, L.L.C.; Farmhut Company L.L.C.; Farmland Hydro, Inc.; Farmland Hydro, Limited Partnership; Feeder Pig Producers I, Inc.; FII Communications, L.L.C.; Flag, Inc.; Flag, L.P.; FS, Inc.; H F I, A Partnership; Harvest States/Farmland Specialty Feeds; Heartland Grain Fuels, L.P.; Heartland Wheat Growers, Inc.; Heartland Wheat Growers, L.P.; Landmark Nutritional Services, L.P.; LFS Management, Inc.; Liquitech Management Group, Inc.; Liquitech, Ltd.; Market Communications Group, L.L.C.; National Beef Packing Company, L.P.; National Carriers, Inc.; Nebraska Energy Limited Liability Company; Nedi-Farmland G.P., Inc.; Nedi-Farmland, L.P.; North Platte Petroleum Corporation, Inc.; North Platte Petroleum Partners, L.P.; Nufarm USA, Inc.; Penterra, Inc.; Pig Producers I, L.P.; Sandoz Crop Protection L.P.; SF Phosphate Limited Company; Southwest Liquids, LLC; Sugar Creek River Terminal LLC; Thompson's Pet Pasta Products, Inc.; Tire & Oil Distributors, L.C.; Tri-Energy Limited Liability Corporation; Universal Cooperatives, Inc.; Westland Terminal, L.L.C.; and Wilfarm, L.L.C.

LIST OF PARTIES – Continued

Rhône-Poulenc Inc., a New York corporation, is the successor-in-interest by merger to respondent Rhône-Poulenc Ag Company, formerly known as respondent Union Carbide Agricultural Products Company and as respondent Amchem Products, Inc. Rhône-Poulenc Inc. is a wholly owned subsidiary of Rhône-Poulenc S.A. of France.

Respondent Platte Chemical Company is a Nebraska Corporation and is a subsidiary of United Agri Products Inc. which in turn is a subsidiary of ConAgra, Inc.

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No. 94-2061

In The

Supreme Court of the United States

October Term, 1995

GARY W. JENKINS,

Petitioner,

v.

AMCHEM PRODUCTS, INC., UNION CARBIDE AGRICULTURAL PRODUCTS CO., RHÔNE-POULENC AG COMPANY, PLATTE CHEMICAL COMPANY, and FARMLAND INDUSTRIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondents, Amchem Products, Inc., Union Carbide Agricultural Products Co., Rhone Poulenc Ag Company, Platte Chemical Company and Farmland Industries, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, Gary W. Jenkins.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, cl. 2 provides:

> "The Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militias, when in actual service in time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner complained against the respondents, all either manufacturers, formulators, or distributors of pesticide products, that his use of chlorophenoxy herbicides either caused or was a substantial factor in causing his non-Hodgkins lymphoma. Chlorophenoxy herbicides, the most well-known of which is 2,4-D, are pesticides which are subject to regulation under the provisions of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA"), 7 U.S.C. § 136 *et seq.*

Respondents' products are registered under the provisions of FIFRA.

Petitioner asserted theories of recovery of negligence, failure to test, failure to warn, and strict liability. (AppB. p.29)[1] The trial court granted summary judgment to respondents on petitioner's failure to warn theories under both negligence and strict liability on the grounds that such claims were pre-empted by Section 24(b) of FIFRA, 7 U.S.C. § 136v(b). (AppB. p.6) Petitioner voluntarily dismissed his claims for manufacturing and design defect based on negligence and failure to adequately test the product. (AppB. p.6) The trial court determined petitioner's remaining strict liability claim was also essentially based upon a failure to warn and granted summary judgment on that claim also. The Kansas Supreme Court upheld the trial court's ruling that Section 24 of FIFRA pre-empts state court tort actions based upon a failure to warn. (AppB. p.19) The Kansas Supreme Court affirmed, on grounds different from the trial court, the dismissal of petitioner's strict liability design defect claims upon state law grounds which are not the subject of the petition for certiorari. (Petition at 4) The Court also rejected petitioner's claim that pre-emption of such claims interferes with a liberty interest under the Fifth Amendment (AppB. pp.29-30) and found no requirement that Congress provide an alternative remedy. (AppB. p.32)

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[1] Appendix References are to the Appendix filed with the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Kansas Supreme Court correctly decided that petitioner's state common law failure to warn claims were pre-empted and no reason appears why this Court should grant discretionary review.

Operation of the Supremacy Clause does not infringe any due process liberty interest of petitioner nor, under the decisions of this Court, must an alternative remedy be provided when pre-emption occurs.

REASONS FOR DENYING THE WRIT

I. THE ISSUE PRESENTED BY THE KANSAS SUPREME COURT'S PREEMPTION DECISION IS NOT OF THE CHARACTER FOR WHICH DISCRETIONARY REVIEW SHOULD BE GRANTED

This Court's Rule 10 indicates the character of the reasons that will be considered in the exercise of the Court's discretion on a Petition for Certiorari. The decision of the Kansas Supreme Court does not fit within any of the applicable criteria.

The Court's decision is not in conflict with the pre-emption decisions of the United States Courts of Appeals and state courts of last resort that have addressed the subject of FIFRA pre-emption subsequent to this Court's decisions in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) and *Gade v. National Solid Waste Management Ass'n*, 112 S.Ct. 2374 (1992).

After the decisions in *Cipollone* and *Gade*, this Court granted certiorari and remanded decisions of two U.S.

Courts of Appeals which had determined 7 U.S.C. § 136v(b) pre-empted state law failure to warn claims. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *cert. granted, vacated and remanded*, 113 S.Ct. 314 (1992); *Papas v. Upjohn*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted, vacated and remanded, Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992). Both of these courts upon remand determined, applying *Cipollone*, that 7 U.S.C. § 136v(b) pre-empted state law failure to warn claims. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S.Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S.Ct. 60 (1993). This Court found both decisions unworthy of discretionary review, and this case is identical to those in its holding. Nothing makes this case more worthy of discretionary review than those cases.

To the contrary, it is now even clearer that there is no need for this Court to review the issues presented in the petition, because there is no indication that any conflict in decisions is likely to arise. Six more Courts of Appeals have since *Cipollone* addressed this precise question and have, without any suggestion of a conflict in their decisions, determined that pre-emption applies. *Taylor v. Pure Gro*, ___ F.3d ___ (9th Cir., June 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. DuPont de Nemours Co.*, 996 F.2d 1346 (1st Cir.), *cert.*

dismissed, 114 S.Ct. 490 (1993); *Shaw v. Dow Brands*, 994 F.2d 364 (7th Cir. 1993).[2]

In addition to this case, the other state court of last resort to decide the question since *Cipollone* has found pre-emption to apply. *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S.Ct. 1944 (1993).

Nor does the decision of the Kansas Supreme Court conflict with applicable decisions of this Court. The only decision by this Court to have addressed the pre-emptive scope of FIFRA is *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991). While the Court found that state regulation of pesticide *use* was not pre-empted, it contrasted this conclusion with withholding of state authority to regulate pesticide labeling:

> [L]ocal use permit regulations – *unlike labeling* or certification – do not fall within an area that FIFRA's "program" pre-empts . . .

Mortier, 111 S.Ct. at 2486-87 (emphasis added). Labeling is the precise issue addressed by the Kansas Supreme Court here, and the court's pre-emption holding is consistent with this Court's decision in *Mortier*.

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[2] In a pre-*Cipollone* case, *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984), the D.C. Circuit concluded that FIFRA did not pre-empt state common law tort suits for failure to warn. In addition to being pre-*Cipollone*, the "choice of reaction" analysis employed by that Court has been discredited by this Court's decision in *International Paper v. Ouellette*, 479 U.S. 481 (1987), and rejected by all the United States Courts of Appeals to subsequently consider the question.

II. REVIEW OF PETITIONER'S DUE PROCESS ARGUMENT SHOULD NOT BE GRANTED, BECAUSE THE KANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH SETTLED LAW AND PETITIONER'S ARGUMENT LACKS MERIT ON ITS FACE

Pre-emption is a mandate of the Supremacy Clause of the United States Constitution, Article VI, cl. 2. Its very purpose, and hence its effect, is to displace state law or state law concepts. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625-26 (1st Cir. 1987). Petitioner's argument (Petition at 16-19) that FIFRA pre-emption violates his due process liberty interest because it pre-empts a state common law remedy would emasculate the Supremacy Clause. That argument is inconsistent with the decisions by this Court holding that pre-emption may operate to leave a person without a common law remedy. *Cipollone, supra* (common law failure to warn claims pre-empted); *Arkansas Louisiana Gas & Co. v. Hall*, 453 U.S. 571, 584 (1981):

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed.

Petitioner seizes upon one sentence of *dictum* in *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1978), where the Court stated:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

(Petition at 14). From this he argues that this Court should accept review of the Kansas Supreme Court's holding that "there is no requirement under the United States Constitution that an alternate cause of action be established." *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869, 886 (1994) (AppB. p.32).

However, the decision of the Kansas Supreme Court is in accord with the decisions of this Court, including *Duke Power*. As this Court stated in *Duke Power*, 438 U.S. at 88 n. 32:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common-law." (Citations omitted.) The "Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object." (Citation omitted.), despite the fact that "otherwise settled expectations may be upset thereby." (Citations omitted.) Indeed, statutes limiting liability are relatively commonplace and have *consistently* been enforced by the courts. (Citations omitted.)

Indeed, if petitioner's argument were correct, the states would hold the federal government in thrall, because Congress could never displace state law in order to promote federal purposes and policies without providing substitute remedies consistent with each state's wishes. State law, not federal law, would be supreme.

Finally, the issue on which petitioner seeks review is not even squarely presented by this case. Petitioner has not been deprived of all potential state law remedies by application of pre-emption to his failure to warn theories.

While he asserts in the Petition (Petition at 19-22) that the existence of other state law claims is a fiction, it was petitioner himself who asserted such other theories of recovery in his Complaint and in the pretrial order. As found by the Kansas Supreme Court:

> Plaintiff's inability to prove a cause of action is not equivalent to that cause of action being pre-empted. Plaintiff initially asserted theories of negligence, failure to test, failure to warn, and strict liability. It is only negligent failure to warn and strict liability failure to warn claims which are preempted by FIFRA. Plaintiff still has viable causes of action to remedy the harm he allegedly suffered by defendants' products even though one theory of liability is preempted. The fact that plaintiff is unable to meet his burden on other theories is a result of plaintiff's lack of proof rather than a result of preemption.

Jenkins v. Amchem Products, Inc., supra; (AppB. pp.28-29).

Petitioner has not been deprived of any constitutionally protected liberty interest. There is no requirement that Congress provide an alternative remedy for petitioner's pre-empted theories of recovery. And petitioner has shown no special or important interests that would call for this Court to exercise its discretion to grant his petition.

CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-2061

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GARY W. JENKINS,
Petitioner,

V.

AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL PRODUCTS CO.;
RHONE POULENC AG. COMPANY;
PLATTE CHEMICAL CO.;
and
FARMLAND INDUSTRIES, INC.,
Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS FAIL TO ADDRESS THE SIGNIFICANCE OF THE *MYRICK* DECISION

The brief in opposition proceeds as if *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L. Ed. 2d 407 (1992) is the last word from this Court regarding preemption of state tort claims. Petitioner submits that *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) is a significant preemption decision that applies in the context of FIFRA preemption. *Myrick* is made even more important by the respondents' failure to cite anything from the record which would cast doubt on the simple truth that there is no federal standard regarding 2,4-D's propensity for causing cancer. Therefore, *Myrick's* holding - that if there is no federal standard for a private party to comply with, the states can impose their own safety standards - should apply with equal force in this case. Respondents never address the significance of *Myrick*.

II. RESPONDENTS' RELIANCE UPON DICTA FROM *MORTIER*, IS MISPLACED

Respondents seize upon dicta from *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991) to imply that the preemptive scope of FIFRA §136v(b), when read in conjunction with the savings clause of FIFRA §136v(a), already has been decided by this court. (Resp. Br. in Opp, at p. 6). Petitioner submits that *Mortier* did not address the preemptive scope of FIFRA in the context presented in this case (involving a state law products liability claim). Indeed, it is significant that the Court in *Mortier* held that FIFRA does not "occupy the field" of pesticide regulation. *See* 111 S. Ct. at 2486. The fact that there is no federal occupation of the field of pesticide regulation is self-evident, unless Congress was so presumptuous as

to believe the EPA could humanly devise a perfect regulatory scheme and that the pesticide industry would, henceforth, label and warn sufficiently to prevent injury. It is far more reasonable to find that Congress intended for state law to provide a remedy when the federal regulatory scheme regarding warnings and labeling failed. *See Silkwood* v. Kerr-McGee Corp., 464 U.S. 238, 263-264 (1984) (Blackmun, J. dissenting). In order to reach a contrary conclusion, one must embrace the proposition that Congress *intended* to leave individuals injured because of a failure to warn *without a remedy.* The impropriety of this proposition, either as a matter of statutory construction, or in the context of a due process inquiry, is not mitigated by the mere possibility of other avenues of recovery. A benign judicial acceptance of such an insidious construct will lead to even more legislation designed to foreclose victims of wrongdoing from pursuing theories of recovery for normative wrongs upon which the proof may warrant a recovery.

III. THE PETITION FOR A WRIT OF CERTIORARI RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

Supreme Court Rule 10.1(a) provides for discretionary review of a decision of a state court that has decided an important question of federal law that has not been, but should be, resolved by this Court. As pointed out in the petition, members of this Court have recognized the importance of the due process question left unanswered in footnote 32 of *Duke Power* v. *Carolina Envtl. Study Group, Inc.*, 489 U.S. 189 (1978). *See Fein v. Permanente*, 474 U.S. 892 (1985) (White, J., dissenting); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

Here, the treatment of the *Duke Power* case by the Kansas Supreme Court literally begs for review by this court. The Kansas Supreme Court noted that under the Kansas Constitution, a quid pro quo is required upon modification of rights protected by the Kansas Constitution. *Jenkins v. Amchem Products, Inc.*, 256 Kan 602, 886

P.2d 869, 885 (1994), app. p. B30-31. The Kansas Court then states: "Both of these Kansas cases involved rights arising out of the Kansas Constitution rather than the United States Constitution." *id.* 886 P2d. at 885, app. p. B31.

The Kansas Supreme Court read *Duke Power* as an affirmative statement that, under the Constitution, Congress need not provide an alternative remedy when it significantly modifies a common law right. *Id.* 886 P.2d at 885-886, app. p. B31-32. That court stated that "Plaintiff's state law claim does not constitute a liberty interest or fundamental right deserving of heightened scrutiny" and applied a "rational basis" test to the challenged statute.[1] *Id.* Herein lies the conceptual dilemma posed by the Kansas Supreme Court's decision. Plaintiff's claim is fundamental under Kansas law, requiring a quid pro quo if modified by the Kansas legislature, yet Congress, in its exercise of the Commerce Clause power can, upon a finding of mere rationality, destroy a fundamental right? The Kansas Court's decision ignores the fact that Commerce Clause power was not intended to interfere with the State's traditional sovereign role of adjusting disputes between private parties. *See United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 1642 (1995) (Thomas, J., concurring)[2]

That a Supreme Court of one of the fifty states could state that Petitioner's rights, under these facts, "arise[ ] out of the Kansas

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[1] Petitioner did not in the Court below, and does not here, raise an equal protection challenge to the statute.

[2] Petitioner concedes Congress has the power to regulate the substance of pesticide labels. Petitioner does not concede that in the mere administrative exercise of that power, that the Commerce Clause allows Congress to divest the States of the exercise of their sovereign power to adjust disputes, unless Congress were to provide a mechanism for an alternative remedy. This is essentially a question of categorization. Congress, in setting standards for pesticide labels, does exercise a valid Commerce Clause power. Congress, in preventing the States from administering justice, without providing an alternative remedy, is not regulating commerce. It is regulating the administration of justice.

Constitution rather than the United States Constitution" is evidence of the conceptual disarray extant in the republic today concerning the formal sources of limitation upon Congressional power represented by the Commerce Clause and the Due Process Clause, and the different policies each clause is designed to vindicate. See, F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite, 75 (1937). Petitioner submits, with all due respect, that this disarray is a result, in no small part, of decisions by this court which imply that it is only the Bill of Rights, or positive state law, which creates the liberty which the Due Process Clause protects. *See Leis v. Flynt,* 439 U.S. 438, 456, n.29, 99 S.Ct. 698, 58 L.Ed. 2d 717 (1979). (Stevens, J., dissenting).

CONCLUSION

The Petition should be granted. The record in this case presents a clean canvas upon which this court can address, in a manner understandable to both law professors and the citizens of this country (1) the role fundamental questions of federalism should play in statutory construction, and if the Court finds that Congress intended to preempt the state law claims at issue, (2) the extent to which Congress' Commerce Clause power is limited by the Due Process Clause.

A failure by this Court to squarely address the issues presented by this Petition will result in the continued federalization of tort law, either through Congressional legislation or the erroneous invocation of preemption doctrine. The current course, if uncorrected, will soon lead to the day when the United States Supreme Court is the court of last resort on a plethora of garden variety tort cases, a result neither contemplated nor capable of being judiciously managed, by Article III of the Constitution.

ERRATA

Petitioner informs the Court that in his initial Petition for a Writ of Certiorari, the citation to the appendix in footnote 10, at page 21, is incorrect. The correct attribution for the quotation within footnote 10 is: app. p. C12.

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